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UNITED STATES REPORTS

VOLUME 306

CASES ADJUDGED

IN

THE U.S. SUPREME COURT

AT

OCTOBER TERM, 1938

FROM JANUARY 17, 1939, TO AND INCLUDING (IN PART) APRIL 17, 1939

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Erratum.—302 U. S. p. 296, line 23, citation should read "301 U. S. 678."

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.[2]
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.[3]
WILLIAM O. DOUGLAS, Associate Justice.[4]

RETIRED

WILLIS VAN DEVANTER, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.[2]
GEORGE SUTHERLAND, Associate Justice.

FRANK MURPHY, Attorney General.
ROBERT H. JACKSON, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

[2] Mr. Justice Brandeis, by letter dated February 13, 1939, notified the President of his retirement effective the same day, pursuant to the Act of March 1, 1937.

[3] Mr. Felix Frankfurter, of Massachusetts, was nominated to be Associate Justice by President Roosevelt on January 5, 1939; the nomination was confirmed by the Senate on January 17; the commission issued January 20; and he took the constitutional and judicial oaths and was seated on January 30, 1939.

[4] Mr. William O. Douglas, of Connecticut, was nominated to be Associate Justice by President Roosevelt on March 20, 1939; the nomination was confirmed by the Senate on April 4; the commission issued April 15; and he took the constitutional and judicial oaths and was seated on April 17, 1939.

vigor. We extend to you our best wishes and the assurance of our affection and profound esteem.

Faithfully yours,

CHARLES E. HUGHES,
PIERCE BUTLER,
HARLAN F. STONE,
OWEN J. ROBERTS,
HUGO L. BLACK,
STANLEY REED,
FELIX FRANKFURTER.

MR. JUSTICE BRANDEIS.

2205 CALIFORNIA STREET

WASHINGTON, D. C.

FEBRUARY 18, 1939.

MY DEAR CHIEF JUSTICE: You and the Associate Justices are very generous. Our friendship gives assurance that throughout the years to come we shall remain companions.

Cordially,

LOUIS D. BRANDEIS.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1938

CURRIN ET AL. *v.* WALLACE, SECRETARY OF AGRICULTURE, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 275. Argued January 4, 1939.—Decided January 30, 1939.

1. There is an actual controversy in this case between plaintiffs and defendants, respecting the constitutionality of the Tobacco Inspection Act of August 23, 1935, entitling the plaintiffs to invoke the Declaratory Judgment Act. P. 9.
2. The Tobacco Inspection Act of August 23, 1935, authorizes the Secretary of Agriculture to establish standards of tobacco and to designate those auction markets where tobacco bought and sold moves in interstate or foreign commerce; and it provides, under penalty, that at a market so designated, no tobacco shall be offered for sale at auction until it has been inspected and certified by an authorized representative of the Secretary according to such standards. He can not designate a market unless two-thirds of the growers voting at a prescribed referendum favor it. In case competent inspectors are not available or for other reasons the Secretary is unable to provide for inspection and certification at all auction markets within a type area, he shall first designate those markets where the greatest number of growers may be served with the facilities available. He may suspend inspection and certification at a market he has designated if competent inspectors are not available or the quantity of tobacco is not enough to justify the cost of the service. *Held:*

(1) Such regulation, for the protection of sellers or purchasers, or both, is within the commerce power as respects the selling for transportation to other States or broad; and in view of the manner of the selling at the auctions, where all transactions are conducted indiscriminately and virtually at the same time, Con-

gress was authorized to apply its regulation to intrastate sales in order to make it effective as to the sales in interstate and foreign commerce. Pp. 9, 11.

(2) The auction is a part of the sales consummated, notwithstanding that in the market practice the growers are not bound to accept bids, and in some instances reject them. P. 10.

(3) Regulations under the commerce clause may have the quality of police regulations. P. 11.

(4) The inspection and grading under the Act, though they take place before the auction, have immediate relation to the sales in interstate and foreign commerce. P. 12.

(5) The fact that, for want of a sufficient number of experts to inspect and grade the tobacco, but a few of the tobacco auction markets in North Carolina have been designated, with the result that some warehousemen operating such markets are bound by the requirements of inspection and certification, while others, in the same sort of business and competing for the patronage of the same growers, remain free from such requirements, does not render the regulation invalid for discrimination. P. 13.

(6) Mere lack of uniformity does not invalidate a regulation of interstate or foreign commerce. P. 14.

(7) The provision for a referendum vote of tobacco growers is merely a condition upon the application of the Congressional regulation, and does not involve unconstitutional delegation of legislative power. P. 15.

(8) The Act does not involve unconstitutional delegation of legislative power to the Secretary of Agriculture. P. 16.

3. It does not appear that in this case the power of the Secretary of Agriculture under the Tobacco Inspection Act was arbitrarily or capriciously used. P. 18.

4. The claim of the plaintiffs in this case, who are warehousemen and auctioneers selling tobacco on commission for the growers who own the tobacco, that the Act inflicts upon them a loss of patronage and business, was not sustained by proof. P. 18.

95 F. 2d 856, affirmed.

CERTIORARI, 305 U. S. 584, to review a decree reversing a decree of the District Court, 19 F. Supp. 211, which, at the suit of certain warehousemen and auctioneers, enjoined the Secretary of Agriculture and other federal officers from enforcing certain requirements of the Tobacco Inspection Act.

Messrs. J. C. Lanier and *B. S. Royster, Jr.*, with whom *Mr. J. W. H. Roberts* was on the brief, for petitioners.

Petitioners are entitled to maintain this suit.

The transaction of offering for sale tobacco at auction on warehouse floors is not a transaction in interstate commerce.

After the tobacco has gone through the auction sale the farmer may, and often does, reject the offered price and take his tobacco away.

The tobacco acquires interstate character only when the sale is consummated and possession passes from grower to purchaser. Tobacco, moving from the fields to the curing barns, and from the curing barns to the warehouse floors, is no part of interstate commerce. Observe that the inspection is required prior to the offering for sale. Control over commodities up to the point of sale is reserved to the States by the Tenth Amendment. *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 246; *Oliver Mining Co.* v. *Lord*, 262 U. S. 172; *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U. S. 210; *Hope Gas Co.* v. *Hall*, 274 U. S. 284.

In *Hammer* v. *Dagenhart*, 247 U. S. 251; *United Leather Workers* v. *Herkert*, 265 U. S. 457; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Kidd* v. *Pearson*, 128 U. S. 1, the Court holds that the manufacture of goods intended to be transported and subsequently shipped in interstate commerce is not interstate commerce.

The cutting of timber, for immediate transportation to other States, is not interstate commerce. *Coe* v. *Errol*, 116 U. S. 517; *McCluskey* v. *Marysville & N. Ry. Co.*, 243 U. S. 36; *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

The ginning of cotton, although the cotton is to be immediately transported in interstate commerce, and although the cotton has already begun its journey from the fields to the market, is not interstate commerce.

Crescent Oil Co. v. *Mississippi,* 257 U. S. 129; *Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17; *Chassaniol* v. *Greenwood,* 291 U. S. 584; *Burco, Inc.* v. *Whitworth,* 81 F. 2d 721.

The generation of electricity, which is instantly thereafter transmitted across state lines, is not interstate commerce. *Utah Power & Light Co.* v. *Pfost,* 285 U. S. 165.

If Congress has the power under the commerce clause or the general welfare clause to compel a person to submit tobacco to Government regulations, prior to its sale and prior to its delivery to the buyer, then such power will deliver to federal control the tobacco yet unplanted and unharvested and unsold, because it is in large part destined for and surely to be exported to States other than that of its production. Cf. *Coe* v. *Errol, supra; Schechter Corp.* v. *United States,* 295 U. S. 495.

Declarations by way of inducement to the enactment which follows add nothing to the validity of the Act.

The power to legislate for the common defense and general welfare of the United States does not justify this Act.

The Act in its application unconstitutionally discriminates between warehousemen.

It unconstitutionally delegates legislative power.

It violates the due process clause of the Fifth Amendment.

The petitioners are disqualified from voting under the terms of the Act, although it vitally affects their business and property, and although it imposes duties and expense upon them without remuneration from the Government. They are put at the mercy of a group of growers who vote affirmatively in favor of the inspection. By this Act the power to legislate is conferred upon these growers, who may be a very small minority of the whole class. Thus it can be seen that this statute under-

takes "an intolerable and unconstitutional interference with personal liberty and private property." *Carter* v. *Carter Coal Co., supra.*

The 1782 growers who voted compulsory grading on petitioners' floors are left at liberty to sell their tobacco ungraded on markets to which the compulsion has not been applied. They have shackled the Oxford warehousemen, who could not vote, but left themselves free to sell their tobacco as they choose.

Mr. Robert K. McConnaughey and *Solicitor General Jackson,* with whom *Assistant Attorney General Arnold* was on the brief, for respondents.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Plaintiffs, tobacco warehousemen and auctioneers in Oxford, North Carolina, seek a declaratory judgment[1] that the Tobacco Inspection Act of August 23, 1935,[2] is unconstitutional and an injunction against its enforcement. The Circuit Court of Appeals, reversing the District Court,[3] sustained the validity of the Act and directed the dismissal of the bill of complaint. 95 F. 2d 856. We granted certiorari. 305 U. S. 584.

The Act states its scope and purpose. §§ 1, 2. It applies to transactions involving the sale of tobacco at auction as commonly conducted at auction markets. These transactions are carried on by tobacco producers and by persons engaged in the business of buying and selling tobacco in commerce as defined, that is, in commerce which is interstate or foreign or is with or within the Territories or the District of Columbia.[4] Congress finds that the

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[1] Declaratory Judgment Act, 48 Stat. 955.

[2] 49 Stat. 731; 7 U. S. C. Supp. III, 511a-511 q.

[3] 19 F. Supp. 211.

[4] See § 1.

classification of tobacco according to type, grade, and other characteristics affects the prices received; that "without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation and control," and "unreasonable fluctuations in prices and quality determinations occur," constituting a burden upon commerce; and that the use of uniform standards is imperative "for the protection of producers and others engaged in commerce and the public interest therein."

The Secretary of Agriculture is authorized to investigate the handling, inspection and marketing of tobacco and to establish standards by which its type, grade, size, condition, or other characteristics may be determined and these standards are to be the official standards of the United States. §§ 3, 4.

The Secretary is authorized to designate those markets where tobacco bought and sold at auction or the products customarily manufactured therefrom move in commerce. He is not to designate a market unless two-thirds of the growers, voting at a prescribed referendum, favor it. The Act provides that after public notice that a market has been so designated, no tobacco shall be offered for sale at auction thereon until it has been inspected and certified by an authorized representative of the Secretary according to the established standards. There is a proviso that in case competent inspectors are not available or for other reasons the Secretary is unable to provide for such inspection and certification at all auction markets within a type area, he shall first designate those markets where the greatest number of growers may be served with the facilities available. § 5.

Warehousemen must provide space on warehouse tickets or other tags or labels used by them for showing the grades as determined by an authorized inspector. § 8. The Secretary is authorized to publish and distrib-

ute, without cost to the grower, timely information on the "market supply and demand, location, disposition, quality, condition, and market prices." § 9. Violation of the requirement of inspection and certification at designated markets, is made a misdemeanor punishable by a fine of not more than $1000 or imprisonment for not more than one year or both. § 12.

The market practices which led to this enactment are disclosed by the record. They are described at length in the Report of the Committee on Agriculture of the House of Representatives on the submission of the bill.[5] The growers sort their tobacco for market as best they can. It is tied in bundles or "hands" and brought to the auction warehouse where it is put in baskets, weighed, and placed in rows on the warehouse floor with a ticket on each pile. The warehousemen auction the tobacco, acting as representatives of the growers and receiving fees at rates fixed by the state law. The auction goes forward with extreme rapidity—about one basket every ten seconds—the auctioneer proceeding along one side of a row and the buyers moving with him. The auction is conducted with a technical vocabulary intelligible only to the initiated, bids being made by well-understood gestures. The sale is not completed until the grower accepts the bid; he may decline the bid and take his tobacco away. The bidders are representatives of tobacco companies and speculators who are experts in grades.[6] The Committee reported that "the possession of grade and price information by the buyers, and the lack of it on the part of the growers, places the growers under a severe handicap in the marketing of their tobacco and opens the way to abuses and practices by which farmers are victim-

[5] Report, Committee of Agriculture, June 5, 1935, to accompany H. R. 8026.

[6] The methods are similar to those followed in Georgia as described in *Townsend* v. *Yeomans*, 301 U. S. 441, 445.

ized. . . . It is the thought of the committee that if the purchaser needs an expert in grades in order to protect his interest in the sale the growers should be accorded the same protection." It also appears from the record that because of the speed of the sale few buyers have the opportunity to make a satisfactory examination of the tobacco and consequently many errors are made, although on the average the buyers are not supposed to suffer seriously. The effect of the methods used is to introduce an unusual degree of uncertainty in the prices which a grower may receive for tobacco of any particular grade.

Under the operation of the Act federal inspectors examine the tobacco about an hour before the sale. They pull samples from each pile and place tickets indicating the grade. Each day there is displayed in the warehouse a report indicating the average price for the government grades sold on the previous day, and weekly reports are issued for the preceding week.

The Secretary promulgated regulations to be effective January 2, 1936. Later, official standard grades for flue-cured tobacco were prescribed. The Secretary designated twenty-three markets throughout the country for compulsory inspection and grading. In North Carolina tobacco was marketed on forty auction markets. Three of these, at Oxford, Goldsboro, and Farmville, were designated.[7] In view of the lack of expertly trained inspectors and graders, all markets in North Carolina could not be designated and defendants say that the markets above named were selected because in previous years the Department had established at these places voluntary inspection of tobacco under the Farm Products Inspection Act[8] and the growers were familiar with the benefits accruing from the federal action.

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[7] A referendum was also had at Smithfield which resulted unfavorably.

[8] 7 U. S. C. 492.

In relation to Oxford, the market here in question, the required referendum was had. Upwards of 8600 ballots were distributed to growers who had sold on that market during the previous season; 1896 ballots were returned, of which 1782 were in favor of the designation. There were 248 other ballots returned, of which 96 per cent. were favorable.

Plaintiffs contend (1) that the transaction of offering tobacco for sale at auction on the warehouse floor is not a transaction in interstate commerce and hence is not subject to congressional regulation; (2) that the Act is invalid because of its discriminatory character; (3) that the Act provides for an unconstitutional delegation of legislative power; and (4) that the Act violates the due process clause of the Fifth Amendment.

The Circuit Court of Appeals found, and the record supports the finding, that there is an actual controversy between plaintiffs and defendants, entitling plaintiffs to invoke the Declaratory Judgment Act. See *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240, 241.

First. Plaintiffs urge that tobacco "is not inherently an interstate commodity"; that the auction transaction is not a sale as title is not passed until the grower accepts the price; that after the auction the grower may, and often does, reject the bid and he may take his tobacco away; that the inspection required by the Act is done prior to the offering for sale; and that until sale and delivery to the purchaser the tobacco is not in interstate commerce and its control is reserved to the State. These objections are untenable. The record shows that the sales consummated on the Oxford auction market are predominantly sales in interstate and foreign commerce. The principal purchasers are few in number and in the main are engaged in the export trade or in the manufacture of tobacco products in other States. It appears that in a given week, shortly before the beginning of this suit,

approximately 2,000,000 pounds of tobacco were sold on the Oxford market, only 15.3 per cent. of which were definitely destined for manufacture in North Carolina. About 14 per cent. were in part for manufacture in North Carolina and in part for other States, and about 62 per cent. moved directly into foreign commerce. The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co.* v. *United States,* 196 U. S. 375, 398, 399; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, 291; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 54; *Stafford* v. *Wallace,* 258 U. S. 495, 519; *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222, 225; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 198; *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 10.

There is no permissible constitutional theory which would apply this principle to purchases of livestock as in the *Swift* and *Stafford* cases, and of grain as in the *Lemke* and *Shafer* cases, and deny its application to tobacco. In the *Lemke* case (*supra,* at pp. 60, 61), condemning the effort of a State to control the buying of grain for shipment to other States, the Court referred to the power of Congress to provide its own regulation for such transactions, saying: "It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This

may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed." And again, in the *Shafer* case (*supra,* at pp. 188, 198), the Court said: "The right to buy it [grain] for shipment, and to ship it in interstate commerce is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution."

The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care. As we said in the *Shreveport* case, 234 U. S. 342, 351, 352, with respect to the intrastate rates of interstate carriers—"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." See, also, *Minnesota Rate Cases,* 230 U. S. 352, 399; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 588; *Stafford* v. *Wallace, supra,* at p. 522. Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale.

Having this authority to regulate the sales on the tobacco market, Congress could prescribe the conditions under which the sales should be made in order to give protection to sellers or purchasers or both. Congress is not to be denied the exercise of its constitutional author-

ity in prescribing regulations merely because these may have the quality of police regulations. It is on that principle that misbranding under the Food and Drugs Act [9] embraces false or misleading statements as to the ingredients of commodities or the effects of their use. See *Seven Cases* v. *United States,* 239 U. S. 510. Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the States to enact inspection laws is recognized by the Constitution. Art. I, §10, par. 2. See *Turner* v. *Maryland,* 107 U. S. 38, 51–54; *Pacific States Co.* v. *White,* 296 U. S. 176, 181. But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress. *Turner* v. *Maryland, supra,* at pp. 57, 58. And Congress has long exercised this authority in enacting laws for inspection and the establishment of standards in relation to various commodities involved in transactions in interstate or foreign commerce.[10] The fact that the inspection and grading of the tobacco take place before the auction does not dissociate the former from the latter, but on the contrary it is obvious that the inspection and grading have immediate relation to the sales in interstate and foreign commerce which Congress thus undertakes to govern.

In *Townsend* v. *Yeomans,* 301 U. S. 441, we recently had under consideration the legislation of Georgia prescribing maximum charges for the services of tobacco

[9] 21 U. S. C. 10.

[10] See, e. g., United States Cotton Standards Act, 7 U. S. C. 51–65; Food and Drugs Act, 21 U. S. C. 14a, 15, 20, 41, 71, 74, 89, 143; United States Warehouse Act, 7 U. S. C. 243; Certification of condition, etc. of agricultural products shipped in interstate commerce, 7 U. S. C. 414; Farm Products Inspection Act, 7 U. S. C. 492; Perishable Agricultural Commodities Act, 7 U. S. C. 499n.

warehousemen who conducted their business in a manner similar to that prevailing in North Carolina. There, the warehousemen strongly insisted that they were engaged in interstate and foreign commerce, as the tobacco sold on their floors was destined for interstate or foreign shipment, and hence that the State was without power to fix their fees. They invoked the federal Act in support of their contention. But we found nothing in the federal Act which undertook to regulate the charges of warehousemen and hence we concluded that Congress had restricted its requirements and left the State free to deal with the matters not covered by the federal legislation and not inconsistent therewith. The authority of Congress to enact the Tobacco Inspection Act was not questioned.

Second. Plaintiffs complain that the Act is discriminatory. They say that warehousemen on other tobacco markets in North Carolina, doing the same sort of business and competing for patronage among the same growers, are at liberty to conduct sales in their warehouses without inspection and certification.

The reason for the selection is shown. The lack of a sufficient number of expert inspectors made it impracticable to supply inspection and grading at all tobacco auction markets. Having this practical difficulty in mind, Congress directed that when for that reason or others the Secretary was unable to provide for inspection and certification at all such markets within a type area, he should first designate those where the greatest number of growers may be served with the facilities that are available. § 5. We do not doubt that such a selection was within the congressional power.

We have repeatedly said that the power given to Congress to regulate interstate and foreign commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed

in the constitution." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be to impose a limitation which the Constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power (Art. I, § 8, par. 3) such as there is with respect to the power to lay duties, imposts and excises (Art. I, § 8, par. 1). *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 327. Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment (*Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Cress,* 243 U. S. 316, 326; *Louisville Bank* v. *Radford,* 295 U. S. 555, 589); but that Amendment, unlike the Fourteenth, has no equal protection clause. *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584.

If it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid. For that contention we find no warrant. It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continuance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power.

Third. The argument that there is an unconstitutional delegation of legislative power is equally untenable. This is not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution. Art. I, § 1; § 8, par. 18. See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421; *Schechter Corporation* v. *United States,* 295 U. S. 495, 529, 541, 542, 553. We have always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. We have said that—"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility." *Panama Refining Co.* v. *Ryan, supra.* In such cases "a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman* v. *Southard,* 10 Wheat. 1, 43. We think that the Tobacco Inspection Act belongs to that class.

So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market "unless two-thirds of the growers voting favor it." Similar conditions are frequently found in police regulations. *Cusack Co.* v. *Chicago,* 242 U. S. 526, 530. This is not a case where a group of producers may make the law and force it upon a minority (see

Carter v. *Carter Coal Co.*, 298 U. S. 238, 310, 318) or where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners (see *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 122). Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions. The distinction was pointed out in *Hampton & Co.* v. *United States*, 276 U. S. 394, 407, where, in sustaining the so-called "flexible tariff provision" of the Act of September 21, 1922,[11] and the authority it conferred upon the President, we said: "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district."

Nor is there an unconstitutional delegation to the Secretary of Agriculture. Congress has set forth its policy for the establishment of standards for tobacco according to type, grade, size, condition, and other determinable characteristics. §§ 3, 4. The provision that the Secretary shall make the necessary investigations to that end and fix the standards according to kind and quality is

[11] 42 Stat. 858, 941, 942.

plainly appropriate and conforms to familiar legislative practice as shown by the various statutes already mentioned.[12] It is not different in principle from the authority conferred upon the Secretary of the Treasury to establish " 'uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States' " (*Buttfield* v. *Stranahan,* 192 U. S. 470, 494), or from that conferred upon the Interstate Commerce Commission to fix standards for safety devices and equipment (*St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 286, 287; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 612), or from that conferred upon the Secretary of War to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to specify and prescribe the structural changes that are required (*Union Bridge Co.* v. *United States,* 204 U. S. 364).

The Secretary of Agriculture is authorized to designate those markets where tobacco bought and sold thereon at auction moves in commerce. § 5. This calls for the ascertainment of a fact. The intention of Congress is clear that markets thus ascertained shall be designated subject to the prescribed conditions and as rapidly as facilities for inspection are available. We find no unfettered discretion lodged with the administrative officer. The requirement of a referendum, as already noted, calls for the expression of the wishes of the growers and the Secretary acts merely as an administrative agent in conducting the referendum. The provision for the suspension of a designated market because competent inspectors are not available or the quantity of tobacco is not enough to justify the cost of the service, sets forth definite as well as reasonable criteria. The statute also lays down a practical rule for the guidance of the Secretary in the

[12] See Note 10.

selection of markets in the event that because of lack of inspectors or other reasons the Secretary is unable to furnish inspection and certification at all auction markets within a type area. In that case he is first to designate those auction markets "where the greatest number of growers may be served with the facilities available to him."

The statute thus defines the policy of Congress and establishes standards within the framework of which the administrative agent is to supply the details. The provisions of the Act are well within the principle of permissible delegation which we applied in relation to the administration of the forest reserve in *United States* v. *Grimaud,* 220 U. S. 506, 517; to the allocation of licenses, wave lengths, etc. in *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285; and to the exercise of the powers conferred upon the Interstate Commerce Commission in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24.

Nor does it appear that, in his use of his authority in the instant case, the Secretary has acted in an arbitrary and capricious manner. As he did not have an adequate corps of experts to supply all the North Carolina markets, he selected those where there had been voluntary inspection under the prior Act.[13] It cannot be said that this was an unreasonable course.

Fourth. Finally, plaintiffs invoke the due process clause of the Fifth Amendment. Plaintiffs are warehousemen and auctioneers acting as agents for the growers who own the tobacco and pay their commissions. Plaintiffs are thus in the position of contesting a regulation for the benefit of their principals because of an alleged interference with their business. The Act does not affect their rate of charges and does not deprive them of any prop-

[13] Farm Products Inspection Act, 7 U. S. C. 492.

erty. The growers, to be sure, may take their tobacco where they please. But even if it were assumed that the contention that the markets subject to the inspection provision would lose patronage could afford ground for resisting this sort of regulation, otherwise valid, the claim in this instance rests more on conjecture than on proof. We agree with the Circuit Court of Appeals that as to the asserted difference of prices obtainable on inspected markets, as compared with those not inspected, the evidence has little probative value and that the loss of business from growers who do not desire the inspection would seem by the record to be more than counterbalanced by the gain of business from those who desire it. 95 F. 2d p. 861.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent.

BOWEN *v.* JOHNSTON, WARDEN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 359. Argued January 11, 1939.—Decided January 30, 1939.

1. The United States has constitutional power to acquire land within the exterior limits of a State for a national park. P. 23.
2. As a general rule review of a determination of the District Court affirming its jurisdiction involving imprisonment for crime is by appellate procedure and not by *habeas corpus*. P. 23.

   This rule is not one defining power to grant the writ but one which relates to the appropriate exercise of power. P. 26.
3. *Habeas corpus* may be appropriately granted where jurisdiction in the criminal case depended upon a question of law, there being no dispute of facts, and where the need for the inquiry is made apparent by exceptional circumstances. P. 27.

Such exceptional circumstances existed in this case, which involved a sentence by the District Court for murder committed in the Chickamauga and Chattanooga National Park, in Georgia. There appeared to be uncertainty and confusion as to whether offenses within the Park were triable by the state or the federal courts. It was represented that murder cases had been tried in each. It did not appear of record that the District Court had considered the question of jurisdiction. There had been no appeal, and it was contended that a reading of the Georgia statute of consent and cession would show that the United States had not acquired jurisdiction so as to bring the offense charged in the indictment within the class of offenses cognizable in the District Court.

4. In *habeas corpus* by one imprisoned for a murder committed in the Chickamauga and Chattanooga National Park, in Georgia, the sole question was whether the United States had exclusive jurisdiction over land in the Park, in virtue of having acquired it by consent of or cession from the Georgia legislature. *Held:*

(1) The federal courts take judicial notice of the Georgia statutes. P. 23.

(2) If these statutes did not give to the United States exclusive jurisdiction over the Park, the indictment did not charge a crime cognizable under the authority of the United States. *Id.*

(3) Although in earlier Acts consenting to acquisitions and ceding jurisdiction of land for the Park, criminal jurisdiction was specifically reserved by the State, exclusive jurisdiction was ceded by the general Act of 1927, purporting to cede exclusive jurisdiction to the United States over any land "which has been or may hereafter be acquired for custom-houses, post-offices, arsenals, other public buildings whatever, or for any other purposes of government," and which reserved the right to serve civil and criminal processes but not criminal jurisdiction over offenses within the ceded territory. P. 28.

(4) This conclusion has support in administrative construction. P. 29.

Referring to an opinion of the Judge Advocate General, July 14, 1930, when the Park was in charge of the War Department.

97 F. 2d 860, affirmed.

CERTIORARI, 305 U. S. 579, to review affirmance below of an order of the District Court denying a petition for a writ of *habeas corpus*.

Mr. Seth W. Richardson argued the cause, and *Mr. Hugh Allen Bowen* was on a brief, for petitioner.

Mr. Bates Booth, with whom *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Edward J. Ennis,* and *George F. Kneip* were on the brief, for respondent.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner was convicted, in 1933, in the District Court of the Northern District of Georgia, of murder committed in 1930 on the Government Reservation known as the Chickamauga and Chattanooga National Park within the exterior limits of the State of Georgia. He was sentenced to imprisonment for life and is confined in the prison at Alcatraz, California.

In 1937, he presented a petition for a writ of *habeas corpus* to the District Judge of the Northern District of California alleging that the indictment was void, and no legal judgment could be based thereon, as it failed to show jurisdiction over the person and subject matter; that the United States did not have exclusive jurisdiction over the Park.[1] He also alleged that on his trial the court did not have the evidence taken down and preserved so that he might appeal, and that, upon this ground and others, he had been deprived of his liberty without due process of law. A copy of the indictment was annexed to the petition. Pursuant to an order to show cause, the Warden made return showing the judgment and the record of commitment. On the return day there was no appearance of petitioner's attorneys, and no evidence, apart from the return and the attached exhibits, was offered. The petition was submitted and later was de-

[1] Criminal Code, § 272, Third; 18 U. S. C. 451.

nied without opinion. On appeal, the order was affirmed. 97 F. 2d 860.

The principal contention before the Circuit Court of Appeals was that the United States did not have exclusive jurisdiction over the Park and hence that the District Court in Georgia did not have jurisdiction to try the petitioner. The court, taking the view that the United States could constitutionally acquire jurisdiction over the Park (*Collins* v. *Yosemite Park Co.*, 304 U. S. 518), held that the question whether the United States did acquire such jurisdiction could not be raised on *habeas corpus*. In view of the importance of the question thus presented, we granted certiorari. 305 U. S. 579.

First. Jurisdiction is conferred upon the District Courts "of all crimes and offenses cognizable under the authority of the United States." Jud. Code, § 24; 28 U. S. C. 41 (2).

Crimes are thus cognizable—

"When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." Crim. Code, § 272; 18 U. S. C. 451, Third.

The last clause covers cases where exclusive jurisdiction is acquired by the United States pursuant to Article I, § 8, paragraph 17, of the Constitution.

In the instant case, no question of fact was presented with respect to the place where the crime was committed. The indictment specified the place, that is,—

"a certain place and on certain lands reserved and acquired for the exclusive use of the United States and under exclusive jurisdiction thereof, and acquired by the United States by consent of the Legislature of the State

of Georgia, to wit: Chickamauga and Chattanooga National Park, sometimes known as Chickamauga and Chattanooga National Military Park, in said State of Georgia."

The sole question was whether this Park was within the exclusive jurisdiction of the United States. There is no question that the United States had the constitutional power to acquire the territory for the purpose of a national park and that it did acquire it. Whether or not the National Government acquired exclusive jurisdiction over the lands within the Park or the State reserved, as it could, jurisdiction over the crimes there committed, depended upon the terms of the consent or cession given by the legislature of Georgia. *Collins* v. *Yosemite Park Co., supra,* pp. 529, 530. See, also, *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 146–148. The federal courts take judicial notice of the Georgia statutes. *Owings* v. *Hull,* 9 Pet. 607; *Lamar* v. *Micou,* 114 U. S. 218, 223. If these statutes did not give to the United States exclusive jurisdiction over the Park, the indictment did not charge a crime cognizable under the authority of the United States.

Second. Where the District Court has jurisdiction of the person and the subject matter in a criminal prosecution, the writ of *habeas corpus* cannot be used as a writ of error. The judgment of conviction is not subject to collateral attack. *Ex parte Watkins,* 3 Pet. 193, 203; *Ex parte Parks,* 93 U. S. 18, 23; *Harlan* v. *McGourin,* 218 U. S. 442, 448; *McMicking* v. *Schields,* 238 U. S. 99, 107; *Riddle* v. *Dyche,* 262 U. S. 333, 335; *Craig* v. *Hecht,* 263 U. S. 255, 277. The scope of review on *habeas corpus* is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged. *Ex parte Siebold,* 100 U. S. 371, 375; *Ex parte Bigelow,* 113 U. S. 328, 331; *Matter of Gregory,* 219 U. S. 210, 213; *Glasgow* v. *Moyer,* 225 U. S. 420, 429; *Knewel* v. *Egan,*

268 U. S. 442, 445. But if it be found that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied, the remedy of *habeas corpus* is available. *Ex parte Lange,* 18 Wall. 163, 178; *Ex parte Crow Dog,* 109 U. S. 556, 572; *In re Snow,* 120 U. S. 274, 285; *In re Coy,* 127 U. S. 731, 758; *Hans Nielsen, Petitioner,* 131 U. S. 176, 182; *In re Bonner,* 151 U. S. 242, 257; *Moore* v. *Dempsey,* 261 U. S. 86, 91; *Johnson* v. *Zerbst,* 304 U. S. 458, 467.

In applying this principle, we have said that the court "has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction." *In re Bonner, supra.* As it is the duty of the District Court, when the prosecution is brought before it, to examine the charge and ascertain whether the offense is of that class, the District Court is thus empowered to pass upon its own jurisdiction. This, under the applicable statute, may require consideration of the place where the offense is alleged to have been committed. The answer to that question may require the examination and determination of questions of fact and law and that determination may be the appropriate subject of appellate review. Thus if, construing a statute, a question of law is determined against the Government on demurrer to the indictment, the case may fall within the provisions of the Criminal Appeals Act. *United States* v. *Sutton,* 215 U. S. 291; *United States* v. *Soldana,* 246 U. S. 530. Or, if decided against the accused, the question may be reviewed by the Circuit Court of Appeals on appeal from the judgment of conviction. In considering the distribution of appellate jurisdiction under the former statute [2] permitting a direct writ of error from this Court to the District Court, when the question of the jurisdiction of the latter was the only

[2] 26 Stat. 827; 36 Stat. 1157, Jud. Code, § 238.

question involved, we drew the distinction between the question of the jurisdiction of the District Court in that aspect and that of the jurisdiction of the United States. *Louie* v. *United States,* 254 U. S. 548, 549, 550. There, on a charge of murder committed within the limits of an Indian reservation, the defendant contended that before the time of the alleged crime he had been declared competent and that the land on which the crime was alleged to have been committed "had been allotted and deeded to him in fee simple." "That the District Court . . . had jurisdiction to determine whether the *locus in quo* was a part of the reservation was not questioned" and the judgment was held to be reviewable by the Circuit Court of Appeals and not directly by this Court. See, also, *Pronovost* v. *United States,* 232 U. S. 487; *Pothier* v. *Rodman,* 261 U. S. 307, 311.

Where on the face of the record the District Court has jurisdiction of the offense and of the defendant and the defendant contends that on the facts shown the crime was not committed at a place within the jurisdiction of the United States, we have held that the judgment is one for review by the Circuit Court of Appeals in error proceedings and that the writ of *habeas corpus* is properly refused. *Toy Toy* v. *Hopkins,* 212 U. S. 542, 549. And, on removal proceedings, we have observed that in a case where the question "whether the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law," these matters "must be determined by the court where the indictment was found" and that "the regular course may not be anticipated by alleging want of jurisdiction and demanding a ruling thereon in a *habeas corpus* proceeding." *Rodman* v. *Pothier,* 264 U. S. 399, 402. See, also, *Henry* v. *Henkel,* 235 U. S. 219, 229. On the same principle, in *Walsh* v. *Archer,* 73 F. 2d 197, where the indictment charged

murder committed on board a vessel on the high seas, the court affirmed an order dismissing a petition for *habeas corpus,* it being contended that the vessel at the time of the commission of the crime was within the State of California and under its jurisdiction, saying—"Whether the location of the alleged crime was upon the high seas and exclusively within the jurisdiction of the United States required consideration of many facts and seriously controverted questions of law, including the alleged error involving the jurisdiction of the court." *Id.,* p. 199.

But the rule, often broadly stated, is not to be taken to mean that the mere fact that the court which tried the petitioner had assumed jurisdiction, necessarily deprives another court of authority to grant a writ of *habeas corpus.* As the Court said in the case of *Coy, supra,* pp. 757, 758, the broad statement of the rule was certainly not intended to go so far as to mean, for example, "that because a federal court tries a prisoner for an ordinary common law offence, as burglary, assault and battery, or larceny, with no averment or proof of any offence against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by *habeas corpus* because the court which tried him had assumed jurisdiction." Despite the action of the trial court, the absence of jurisdiction may appear on the face of the record (see *In re Snow, supra; Hans Nielsen, Petitioner, supra,* p. 183) and the remedy of *habeas corpus* may be needed to release the prisoner from a punishment imposed by a court manifestly without jurisdiction to pass judgment.

It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. *Ex parte Lange, supra.* The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the

power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. It has special application where there are essential questions of fact determinable by the trial court. *Rodman* v. *Pothier, supra.* It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the statute on which the charge is based. *Id.; Glasgow* v. *Moyer, supra; Henry* v. *Henkel, supra.* But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent. Among these exceptional circumstances are those indicating a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions. *In re Lincoln,* 202 U. S. 178, 182, 183; *Henry* v. *Henkel, supra,* pp. 228, 229.

We think that there are such exceptional circumstances in this instance. There appear to be uncertainty and confusion with respect to the question whether offenses within the Chickamauga and Chattanooga National Park are triable in the state or federal courts. It is represented that murder cases have been tried in the state court as well as in the federal court. If the District Court which tried petitioner gave consideration to the question, it made no comment on the subject, as it rendered no opinion and apparently made no record of its proceedings aside from the indictment and judgment. The matter stood without any judicial explication and without appeal. If, as contended, there being no disputed questions of fact, a reading of the Georgia statute of consent and cession would show that the United States had not acquired jurisdiction so as to bring the offense charged in the in-

dictment within the class of offenses cognizable in the District Court, we think that it was within the province of the court to which the application for *habeas corpus* was made to examine the question and to issue the writ in case the claim of want of jurisdiction in the trial court was found to be a valid one.

Third. Our examination of the Georgia statutes leads to the conclusion that it is unnecessary to remand the case for the determination of the District Court but that it may be, and should be, disposed of at once by our decision.

The lands which are embraced within the Chickamauga and Chattanooga National Park, and lie within the exterior limits of the State of Georgia, were acquired under the provisions of the Act of Congress approved August 19, 1890, and supplementary legislation. 26 Stat. 333. The Act provided for the establishment of the Park "upon the ceding of jurisdiction by the legislature of the State of Georgia." The lands were acquired in 1891 and subsequent years. Some were acquired by purchase and some by condemnation. Consent was given and jurisdiction was ceded to the United States by an Act of the Legislature of Georgia approved November 19, 1890. Georgia Laws, 1890–91, vol. 1, p. 199. The Act specifically reserved to the State of Georgia criminal jurisdiction in the ceded territory by the following proviso:

"*provided,* that this cession is upon the express condition that the State of Georgia shall so far retain a concurrent jurisdiction with the United States over said lands and roads as that all civil and criminal process issued under the authority of this State may be executed thereon in like manner as if this Act had not been passed; and upon the further express conditions, that the State shall retain its civil and criminal jurisdiction over persons and citizens in said ceded territory as over other persons and citizens in the State, and the property of said citizens and resi-

dents thereon, except land and such other property as the general government may desire for its use, and that the property belonging to persons residing within said ceded territory shall be liable to State and county taxes, the same as if they resided elsewhere, and that citizens of this State in said ceded territory shall retain all rights of State suffrage and citizenship . . .;"

Later Acts of cession contained a similar reservation as to criminal jurisdiction.[3]

If the matter rested with these statutes, there would be no room for doubt that jurisdiction to punish for crimes committed on the lands within the Park remained with the State. See *James* v. *Dravo Contracting Co., supra.* But in 1927, another cession act of a general character was passed by the state legislature, purporting to cede exclusive jurisdiction to the United States over any land "which has been or may hereafter be acquired for custom-houses, post-offices, arsenals, other public buildings whatever, or for any other purposes of government." Georgia Laws, 1927, p. 352. This Act reserved the right to serve civil and criminal processes but not criminal jurisdiction over offenses within the ceded territory.

The argument is strongly pressed that as this is a general act and there is no express repeal of, or specific reference to, the earlier special acts relating to the lands within the Park, it should not be regarded as yielding the jurisdiction which the earlier acts reserved to the State. But we find that the administrative construction is to the contrary. The administration of the Park was placed with the War Department [4] and it appears from its files that on July 14, 1930, upon a review of the pertinent legislation, the Judge Advocate General gave an opinion that the Act of 1927 "vests exclusive jurisdiction in the

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[3] Georgia Laws, 1893, p. 110; 1895, p. 77; 1901, p. 85; 1902, p. 110.

[4] Transferred to the National Parks Service, Department of the Interior by Executive Order No. 6166, June 10, 1933.

United States over that part of the Chickamauga and Chattanooga National Military Park located within the State of Georgia" and that violations of law occurring on the ceded lands are enforceable only by the proper authorities of the United States. As this administrative construction is a permissible one we find it persuasive and we think that the debated question of jurisdiction should be settled by construing the Act of 1927 in the same way.

On this ground, the judgment of the Circuit Court of Appeals, affirming the order of the District Court denying the petition for *habeas corpus,* is

Affirmed.

WASHINGTONIAN PUBLISHING CO. *v.* PEARSON ET AL.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 222. Argued December 6, 1938.—Decided January 30, 1939.

1. Section 12 of the Copyright Act of 1909 provides that, after copyright has been secured by publication with the prescribed notice of copyright, two copies of the copyrighted work shall be "promptly" deposited in the copyright office; and that no suit for infringement shall be maintained "until" the provisions of the Act with respect to the deposit of copies and registration of such work shall have been complied with. *Held* that the right to sue under the Act for infringement is not lost by mere delay in depositing copies of the copyrighted work. P. 39.
2. Fourteen months after the date of its publication and six months after it had been infringed, copies of a publication which bore notice of copyright were deposited in the copyright office and a certificate of registration secured. *Held,* a suit to enjoin the infringement and to recover damages (from the date of publication of the infringing work) was maintainable under the Copyright Act of 1909. Pp. 33, 39.
3. The Copyright Act of 1909 was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without

burdensome requirements. Forfeitures of such rights are not to be inferred from doubtful language. Pp. 36, 42.

68 App. D. C. 373; 98 F. 2d 245, reversed.

CERTIORARI, 305 U. S. 583, to review the reversal of a decree for the plaintiff in a suit for infringement of a copyright.

Mr. Horace S. Whitman, with whom *Mr. Gibbs L. Baker* was on the brief, for petitioner.

Mr. Eliot C. Lovett, with whom *Mr. Elisha Hanson* was on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By this suit, instituted in the District of Columbia, March 8, 1933, petitioner seeks an injunction, damages, etc., because of alleged unauthorized use of a magazine article copyrighted under Act March 4, 1909 (Ch. 320, 35 Stat. 1075; U. S. C., Title 17). Pertinent portions of the statute are in the margin.[1] *Bobbs-Merrill Co.* v. *Straus,*

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[1] Act March 4, 1909—

"Sec. 1. That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work; . . .

"Sec. 3. That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act.

"Sec. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.

"Sec. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to

210 U. S. 339, 346; *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 188.

The trial court sustained petitioner's claim and directed ascertainment of profits, damages, etc. The Court of Appeals ruled that, as copies of the magazine had not been *promptly* deposited in the Copyright Office as directed by

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each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, . . .

"Sec. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act.

"Sec. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.

"Sec. 13. That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

"Sec. 18. That the notice of copyright required by section nine of this Act shall consist either of the word "Copyright" or the abbreviation "Copr.", accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the

§ 12, the action could not be maintained. It accordingly reversed the decree of the trial court and remanded the cause.

The record discloses—

December 10, 1931, petitioner published an issue of "The Washingtonian," a monthly magazine, and claimed

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notice shall include also the year in which the copyright was secured by publication. . . .

"Sec. 20. That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, . . .

"Sec. 23. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedie or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and ex-

copyright by printing thereon the required statutory notice. Fourteen months later, February 21, 1933, copies were first deposited in the Copyright Office and a certificate of registration secured. This suit followed, March 8, 1933.

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tension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

"Sec. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: *Provided, however,* That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided,* That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term.

"Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement;

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . .

"Sec. 27. That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

"Sec. 54. That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof.

"Sec. 55. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain his name and address,

In August, 1932, Liveright, Inc., published and offered for general sale a book written by two of the respondents and printed by another, which contained material substantially identical with an article contained in The Washingtonian of December, 1931. The usual notice claimed copyright of this book. August 26, 1932, copies were deposited in the Copyright Office and certificate of registration issued.

Respondents concede that petitioner secured upon publication a valid copyright of The Washingtonian. But they insist that although prompt deposit of copies is not prerequisite to copyright, no action can be maintained

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. . . Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

"Sec. 59. That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

"Sec. 60. That of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the register of copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed: . . .

"Sec. 62. That in the interpretation and construction of this Act 'the date of publication' shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word 'author' shall include an employer in the case of works made for hire."

because of infringement prior in date to a tardy deposit. Counsel assert—"The very foundation of the right to maintain an action for infringement is deposit of copies and registration of the work. Neither of these has the slightest bearing upon the creation of the copyright itself under Section 9. That is obtained merely by publication with notice as required by the Act." Also, "If copies were not deposited promptly after publication the opportunity to comply with the requirement of promptness was gone forever as to that particular work."

Petitioner submits that under the statute *prompt* deposit of copies is not prerequisite to an action for infringement; and that under the facts here disclosed deposit before suit was enough.

The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; "to afford greater encouragement to the production of literary works of lasting benefit to the world." [2]

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[2] See Act of March 3, 1891, Ch. 565, 26 Stat. 1106; *Goubaud* v. *Wallace* (1877), 36 Law Times (N. S.) 704, 705; 25 W. R. 604; *Cate* v. *Devon & Exeter Constitutional Newspaper Co.* (1889), L. R. 40 Ch. D. 500, 37 W. R. 487, 58 L. J. Ch. 288, 60 L. T. 672, 5 T. L. R. 229; *Lumiere* v. *Pathé Exchange* (1921), 275 F. 428; *Mittenthal* v. *Berlin* (1923), 291 F. 714.

Also Report of House Committee on Patents, February 22, 1909 (No. 2222). Among other things this says—

"Sections 12 and 13 deal with the deposit of copies, and should be considered together. They materially alter the existing law, which provides that in order to make the copyright valid there must be deposited two complete copies of the book or other article not later than the date of first publication. The failure of a shipping clerk to see that the copies go promptly forward to Washington may destroy a copyright of great value, and many copyrights have been lost because by some accident or mistake this requirement was not complied with. The committee felt that some modification of

Under the old Act deposit of the work was essential to the existence of copyright. This requirement caused serious difficulties and unfortunate losses. (See H. R. Report, note 2, *supra.*) The present statute (§ 9) declares—"Any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act [§ 18]; . . ." And respondents rightly say "It is no longer necessary to deposit anything to secure a copyright of a published work, but only to publish with the notice of copyright."

Section 10 declares—

"That such person may obtain registration of his claim to copyright by complying with the provisions of this

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this drastic provision, under which the delay of a single day might destroy a coypright, might well be made. The bill reported by the committee provides that there shall be 'promptly' deposited in the copyright office, or in the mail addressed to the register of copyrights, two complete copies of the best edition then published, and that no action or proceeding shall be maintained for the infringement of copyright in any work until the provisions with respect to the deposit of copies and the registration of such work shall have been complied with.

"If the works are not promptly deposited, we provide that the register of copyrights may at any time after publication of the work, upon actual notice, require the proprietor of the copyright to deposit, and then in default of deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void. It was suggested that the forfeiture of the copyright for failure to deposit copies was too drastic a remedy, but your committee feel that in many cases it will be the only effective remedy: certainly the provision for compelling the deposit of copies by the imposition of a fine would be absolutely unavailing should the copyright proprietor be the citizen or subject of a foreign state."

Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

Section 12—

"That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

Section 13—

"That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, . . . the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

Sections 59 and 60 were new legislation. They show clearly enough that deposit of copies is not required primarily in order to insure a complete, permanent collection of all copyrighted works open to the public. Deposited copies may be distributed or destroyed under the direction of the Librarian [3] and this is incompatible with

[3] See Report Register Copyrights for 1938. During the year there were 166,248 registrations; 194,433 current articles deposited were

the notion that copies are now required in order that the subject matter of protected works may always be available for information and to prevent unconscious infringement.

Although immediately upon publication of The Washingtonian for December, 1931, petitioner secured copyright of the articles therein, respondents maintain that through failure promptly to deposit copies in the Copyright Office the right to sue for infringement was lost. In effect, that the provision in § 12 relative to suits should be treated as though it contained the words "promptly," also "unless" instead of "until," and read—No action or proceeding shall be maintained for infringement of copyright in any work *unless* the provisions of this Act with respect to the deposit of copies *promptly* and registration of such work shall have been complied with.

Plausible arguments in support of this view were advanced by the Court of Appeals. We think, however, its adoption would not square with the words actually used in the statute, would cause conflict with its general purpose, and in practice produce unfortunate consequences. We cannot accept it.

Petitioner's claim of copyright came to fruition immediately upon publication. Without further notice it was good against all the world. Its value depended upon the possibility of enforcement.

The use of the word "until" in § 12 rather than "unless" indicates that mere delay in making deposit of copies was not enough to cause forfeiture of the right theretofore distinctly granted.

Section 12 provides "That after copyright has been secured by publication of the work with the notice of

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transferred to the Library of Congress. Also 3,612 motion picture films, and 43,302 deposits from other classes were returned to the authors or proprietors.

copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office" two copies, etc. The Act nowhere defines "promptly," and to make the continued existence of copyright depend upon promptness would lead to unfortunate uncertainty and confusion. The great number of copyrights annually obtained is indicated by note 3, *supra*. The difficulties consequent upon the former requirement of deposit before publication are pointed out in the Committee Report. These would be enlarged if whenever effort is made to vindicate a copyright it would become necesary to show deposits were made promptly after publication especially since there is no definition of "promptly."

Section 13 authorizes the register of copyrights to give notice if he finds undue delay and to require deposit of copies. Upon failure to comply within three months the proprietor shall be subject to a fine and the copyright shall become void. Evidently mere delay does not necessarily invalidate the copyright; its existence for three months after actual notice is recognized. Without right of vindication a copyright is valueless. It would be going too far to infer that tardiness alone destroys something valuable both to proprietor and the public.

Section 20 saves the copyright notwithstanding omission of notice; § 23 declares "That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: . . ." Furthermore, proper publication gives notice to all the world that immediate copyright exists. One charged with such notice is not injured by mere failure to deposit copies. The duty not to infringe is unaffected thereby. A certificate of registration provided for by § 55 apparently may be ob-

tained at any time and becomes evidence of the facts stated therein.

Sections 23 and 24, which permit renewal of a copyright by application and registration within its last year although the deposited copyrighted publication may have been disposed of under §§ 59–60, give clear indication that the requirement for deposit is not for the purpose of a permanent record of copyrighted publications and that such record is not indispensable to the existence of the copyright.[4]

The penalty for delay clearly specified in § 13 is adequate for punishment of delinquents and to enforce contributions of desirable books to the Library. To give § 12 a more drastic effect would tend to defeat the broad purpose of the enactment. The Report of the Congressional Committee points out that forfeiture after notice

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[4] For Statement of the views of the Copyright Office concerning Act of 1909 and practice thereunder, see Letter from the Register of Copyrights to the Librarian of Congress dated September 17, 1938, printed at the Government Printing Office 1938. The following appears therein—(p. 20)

"The failure to make deposit within the proper time does not in itself invalidate the copyright which has already been secured by publication with notice; this can now result only after failure to make deposit upon actual notice as provided in Section 13.

"It is true that Section 12 provides that no action or proceeding shall be maintained for infringement until the 'deposit of copies and registration' have taken place, which presumably was added as a special inducement to make prompt deposit; but this does not answer the question.

"Heretofore, the practice of the office has been to accept copies at any time subsequent to publication with notice; thus, in effect, attaching no significance to the word 'promptly'; and certain decisions of the courts seem to sanction the practice . . .

"It seems very desirable to remove this doubt and uncertainty by eliminating the word 'promptly' from Section 12, leaving Section 13 as heretofore to take care of any delinquent. . . ."

and three months' further delay was thought too severe by some. Nowhere does it suggest approval of the much more drastic result now insisted upon by respondents.

Read together as the Committee which reported the bill said they should be, §§ 12 and 13 show, we think, the Congress intended that prompt deposit when deemed necessary should be enforced through actual notice by the register; also that while no action can be maintained before copies are actually deposited, mere delay will not destroy the right to sue. Such forfeitures are never to be inferred from doubtful language.

This view is in accord with the interpretation of somewhat similar provisions of the English Copyright Act. *Goubaud* v. *Wallace* and *Cate* v. *Devon Constitutional Newspaper Co., supra.* Also with the conclusions reached in *Lumiere* v. *Pathé Exchange* and *Mittenthal* v. *Berlin, supra.*

The challenged decree must be reversed. The cause will be remanded to the District Court.

Reversed.

MR. JUSTICE BLACK, dissenting.

The opening words of the 1909 copyright law,[1] under which petitioner here claims, grant the privilege of copyright only to those who have complied "with the provisions of this Act." The provisions of that 1909 Act, of the first copyright Act of 1790,[2] and of every copyright Act passed since 1790, have required that copies of a copyrighted article be delivered to a designated governmental depository. Until today, this Court has never permitted recovery for infringement of a copyright unless the statutory requirement for deposit had been complied with in the manner and within the time required by the govern-

[1] 35 Stat. 1075.

[2] 1 Stat. 124, 125.

ing copyright statute. The 1909 Act—governing the present case—requires that "after copyright has been secured by publication of the work with the notice of copyright as provided in Section nine of this Act, there shall be *promptly* deposited in the copyright office or in the mail addressed to the register of copyrights, . . . two complete copies of the best edition thereof then published, . . ." (Italics supplied.)

It is admitted that petitioner did not comply with the statute by prompt deposit of two copies of its work. Fourteen months elapsed between the date of publication and the date of deposit. Petitioner's asserted monopoly rights rest solely on the statute [3] and petitioner disobeyed the statute's requirements. Notwithstanding this disobedience, petitioner is here permitted to collect damages under the statute, even for alleged infringement committed in the fourteen month period during which the statute's express command was continuously disregarded by petitioner. This century and a half old statutory requirement for public deposit of a copyrighted article provided a public record for the public's benefit. It imposes a simple and easily performed duty—not burdensome in any respect—in return for a twenty-eight year monopoly, with right of renewal for twenty-eight more years. To permit recovery here protects the copyright owner's statutory privilege of monopoly, but emasculates the statutory provisions designed—for over a century and a half—to protect the public.

The judgment here rests upon the conclusions: (1) that the statute grants a copyright from the date of first publication with notice; (2) that after deposits are made the statute permits a retroactive recovery for public use

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[3] *Banks* v. *Manchester,* 128 U. S. 244; *Caliga* v. *Inter Ocean Newspaper Co.,* 215 U. S. 182, 188; *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, 346; *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356, 367.

of an article of which copies were never promptly deposited as required by the statute; (3) that § 13 provides an exclusive penalty for failure to make the deposit; and (4) that—according to administrative interpretation of the Act—deposits are not essential. These conclusions are not in harmony with the historic policy of the copyright law.

First. There is no novelty in the requirement of the Act of 1909 that deposit of copies shall be made after the copyright has already been secured. Every copyright Act, including the original Act of 1790, provided for a copyright interest which (as in the 1909 Act) vested prior to the time by which the last deposit was required. True, the 1909 Act grants a copyright upon first publication, that is, before the date on which deposit is required. But all of the previous Acts granted a copyright interest "from the [time of] recording the title" of an article, and recording always took place before the date by which the last deposits were required.[4] And while a copyright interest under the Acts prior to that of 1909—as in that Act—thus vested before the last deposits were required,

[4] Section 4 of the first Act of 1790, 1 Stat. 124, 125, required the last deposit of one copy of the copyrighted article "within six months after the publishing thereof . . ."; § 4 of the Act of 1831, 4 Stat. 436, 437, required the last deposit to be made "within three months from the publication . . ."; § 10 of the Act of 1846, 9 Stat. 102, 106, required the last deposits to be made "within three months from the publication . . ."; § 2 of the Act of 1865, 13 Stat. 540, required the last deposit to be made "within one month of the date of publication . . ."; the Act of 1867, 14 Stat. 395, required deposit "within one month after publication . . ."; § 93 of the Act of 1870, 16 Stat. 213, required the last deposits "within ten days after . . . publication . . ."; Revised Statutes of 1878, § 4956, required deposit "within ten days from the publication . . ."; § 3 of the Act of 1891, 26 Stat. 1106, required deposit "not later than the day of the publication . . ."; § 12 of the Act of 1909, 35 Stat. 1078, provides that "after copyright . . . , there shall be promptly deposited . . ."

this Court uniformly held that under these Acts "conditions subsequent" providing for deposits were actually "conditions precedent" to the perfection of the copyright. Construing the requirement of deposits in the Acts of 1790 and 1802, this Court said: "The answer is, that this is not a technical grant of precedent and subsequent conditions. *All the conditions are important;* the law requires them to be performed; *and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests;* and this was essential to its protection under the statute; *but other acts are to be done, unless congress have legislated in vain, to render the right perfect.*" (Italics supplied.)[5]

The 1831 Act was also construed by this Court as follows: "Although, under § 6 of the . . . act, the exclusive right to the *copyright vests upon the recording of the title to the book,* and runs for the prescribed period from that date, and although the right of action for infringement, under § 6, also accrues at that time, yet it is quite clear, that, under § 4, in respect at least to suits brought after three months from the publication of the book, [within which the 1831 Act required deposit] it must be shown, as a condition precedent to the right to maintain the suit, that a copy of the book was delivered to the clerk of the District Court within three months from the publication. . . . Undoubtedly, *the three conditions* prescribed by the statute, namely, the deposit before publication of the printed copy of the title of the book, the giving of information of the copyright by the insertion of the notice on the title-page or the next page, and the depositing of a copy of the book within three months after the publication, *are conditions prece-*

[5] *Wheaton & Donaldson* v. *Peters & Grigg,* 8 Peters 591, 665.

dent to the perfection of the copyright." (Italics supplied.)[6]

Second. All copyright laws before 1891 had required deposit within some designated period after publication. The Act of 1891, however, required deposit "not later than the date of [first] publication." The Joint Committee on the bill which became the 1909 Act considered this requirement too drastic because "the delay of a single day" (after publication) in making the deposit "might destroy a copyright." Instead of requiring deposit within a fixed number of days, or by the date of publication, the bill as reported, and the 1909 Act as passed, permitted a copyright to be perfected by a "prompt deposit" after publication. The Committee did not recommend, nor did Congress provide that copyright could be perfected without deposit; the Committee did recommend, and Congress enacted an extension of the time for deposit.

In considering what Congress meant by continuing in the 1909 revision of the copyright laws the requirement for the deposit of copies, "we must look to the origin and source of the expression and the judicial construction put upon it before the enactment in question was passed."[7] Prior to the 1909 Act this Court had construed provisions for deposit as essential requirements to the perfection of copyright, whether considered as conditions precedent or subsequent.[8] The Committee reporting the 1909 Act pointed out that "Under existing law [the 1891 Act] the filing of title and deposit of copies on or before the date of first publication are *conditions precedent,* and any failure to comply with them works a forfeiture of

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[6] *Callaghan* v. *Myers,* 128 U. S. 617, 651, 652; cf. *Merrell* v. *Tice,* 104 U. S. 557; *Thompson* v. *Hubbard,* 131 U. S. 123, 150.

[7] *Kepner* v. *United States,* 195 U. S. 100, 121.

[8] See notes 5, 6, *supra.*

the copyright. It is proposed under this bill to so change this as to have the copyright effective upon the publication with notice, and the other formalities become *conditions subsequent.*" [9]

"A condition precedent is one which must happen or be performed before the estate to which it is annexed can vest" or which must be performed "before some right dependent thereon accrues." [10] A "condition subsequent is one annexed to an estate already vested, . . . and by the failure or non-performance of which it is defeated." [11]

It is clear that Congress intended that the requirement as to deposits must be complied with in order to perfect the copyright interest under the 1909 Act. Any other construction runs counter to the policy of the copyright law and rewards disobedience to plain statutory provisions.

Only compelling language could justify the conclusion that Congress intended to abandon a statutory policy—in effect since 1790—which required owners of patent or copyright monopolies to disclose upon the public records the extent of their claimed monopolies. Under the prevailing judgment here, public deposit and public registration are no longer necessary in order to obtain rights under the copyright law. And without deposit and registration, there need be no public disclosure of the day or the year of publication (by which copyright is obtained) of many copyrighted works. Under § 18—the only mandatory provision for public disclosure now left unimpaired—many types of copyright will be obtained merely by marking publications with the name of the proprietor and the word "Copyright", "Copyr.", or

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[9] House Rep. No. 2222, 60th Cong., 2nd Sess., p. 10.

[10] Black's Law Dictionary, 3rd Ed., West Publishing Co., 1933.

[11] *Id.*

"C". Hereafter, there need be no public (or even private) record of the beginning and the ending of many of these monopolies. And it is unreasonable to assume that an owner of a copyright will voluntarily make the extent and limitations of his monopoly more public than the law requires. Congress did not intend to enshroud copyright monopolies in such secrecy (See §§ 16, 23, 55, 62). If disobedience of the statutory requirement is to be rewarded, the reward should certainly be limited—as the Court of Appeals held—so that a deposit which does not comply with the law could not be given retroactive operation permitting recovery of damages for public use during the period of disobedience.

Third. Section 12 of the 1909 Act—requiring registration and prompt deposit, after publication, of two complete copies of the best edition of a copyrighted article—provides that no action or proceeding shall be maintained for copyright infringement until the required copies are deposited and the article registered with the register of copyrights. Under § 13, if the copies are not promptly deposited after publication, the register of copyrights may demand deposit by the proprietor. If deposit is not then made within three months, the proprietor is liable to a fine of $100.00 and payment to the Library of Congress of twice the amount of the retail price of the best edition of the article, and the copyright becomes void for all purposes. It is suggested that § 13 provides the sole and exclusive penalty for failure to comply with the statutory requirement of prompt deposit of copies. But this ignores one of the two distinct purposes of Congress in requiring deposits of copies in the 1909 Act and in all preceding copyright Acts. First, the deposit is intended to record publicly full and complete information about a work for which copyright is claimed and to make that work continuously available for public

inspection in order that the extent and boundaries of the monopoly may be understood by the public at all times during the life of the copyright. The judgment here renders this primary Congressional purpose ineffective. Second, Congress intended to preserve "desirable or useful" [12] works in a governmental agency dedicated to the diffusion of public knowledge. In furtherance of this second purpose the Act of 1909,—as did other Acts since 1846—required copies to be deposited with the Library of Congress. These two separate and distinct purposes have been manifested by Congress sometimes in different sections of a single copyright statute and at other times in separate Acts.

To effectuate the first purpose, that is, to notify the public of the existence and extent of a copyright monopoly, the first Act of 1790 required deposit, public recording and registration in a District Court, and publication in a newspaper; the Act of 1831 required deposit with the Clerk of a District Court (without penalty for failure to deposit); the Act of 1870 required deposit of one copy of the title with the Librarian of Congress *before* publication and two copies of the article within ten days after publication without provision for money penalty for failure to comply; § 4956 of the Revised Statutes (1878) required deposit of one copy of the title *before* publication and two copies of the work after publication. Deposit has served as an integral part of every legislative plan to give the public full information of copyright monopolies. These plans have included deposits, registration, notice on the copyrighted article itself and full publication in newspapers. Deposit, registration and notice on the article—which every prior copyright Act required—are specifically provided for in the 1909 Act.

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[12] § 60, Act of 1909.

To effectuate the second purpose, that is, to preserve worthy works for the diffusion of knowledge, the Act of 1790 made separate provision for delivery of an additional copy to the Secretary of State "to be preserved in his office"; in a non-copyright Act of 1846, (9 Stat. 102, 106) creating the Smithsonian Institute "for the diffusion of knowledge," Congress required deposit of separate copies with the Institute and with the Library of Congress; a special Act of 1865 (13 Stat. 540, the origin of § 13 now considered) permitted a separate copy to be franked to the Library of Congress within a month of publication "for the use of said Library," gave the Librarian the right to demand this additional copy, and penalized non-compliance with his demand by forfeiture of copyright; § 93 of the Act of 1870 required two additional copies of the best edition to be delivered, within ten days after publication, to the Librarian of Congress, and (§ 94) "in default of such deposit" which was required for the benefit of the Library, a penalty of $25.00 could be collected by the Librarian of Congress; § 4959 of the Revised Statutes (1878) required deposit of two additional separate copies of the best edition "within ten days from publication" with the Librarian of Congress, and § 4960 extended the penalty of $25.00 to cover all failures to make deposits of copies.

Section 12 of the Act of 1909, following the provisions of the Act of 1891 (26 Stat. 1106) provided in a single section for deposit of copies with the Librarian both for notice to the public and for use of the Library. Section 13 of the 1909 Act now provides in a single section—as had § 4960 of the Revised Statutes—a penalty for failure to make deposits which are required for the two purposes of notice to the public and use by the Library. Neither this § 13 nor any of its legislative predecessors indicated a Congressional intent to abandon—as a con-

dition to the perfection of a copyright—the requirement of deposits for the salutary purpose of providing adequate public records of the existence and continuing extent of copyright monopolies. Section 13 gives the Librarian of Congress authority to demand deposit of copies of every article on which copyright is claimed, adding an additional penalty for failure to comply with his demand. This additional penalty may be imposed whether the claimed copyright is valid or invalid, and does not nullify the mandatory provision of § 12 requiring deposit of copies for the public benefit.

Section 12 itself provides that "no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with." Compliance with "the provisions of this Act" is made a condition of the right to sue, and the Act is not complied with by delaying fourteen months after publication before making deposit. The Act requires "prompt deposit."

It is said that two new sections (59 and 60) of the 1909 Act indicate an intention of Congress to abandon the protective mandate for public record of copyright monopolies. These sections show a contrary purpose and distinctly mark the line between deposits for Library uses and deposits for public information.

Section 59 permits the Librarian of Congress acting alone to transfer deposited copies to other governmental libraries for their use. Since 1909, acting under this authority, the Librarian has distributed 186,037 volumes.[13]

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[13] The books were distributed to the Departments of Agriculture, Commerce, Navy, Treasury, Education; and to the Federal Trade Commission, Bureau of Standards, Army Medical Library, Walter Reed Hospital, Engineer School, Corps of Engineers, Soldiers' Home, District of Columbia Library and others. Annual Report, Register of Copyrights, 1938, p. 4.

Section 60 permits the Librarian (supervising both the Library and Copyright offices) acting jointly with the Register of Copyrights, (directly in charge of deposits for copyright purposes) to determine what deposits "received during *any period of years* it is desirable or useful to preserve in the *permanent files of the Copyright Office* . . ." (Italics supplied.) After duly published notice to the public, and "specific notice to the copyright proprietor of record" other articles can be destroyed or returned to the proprietor "of record." But even as to articles destroyed or returned, public records of the copyright monopolies must be retained in the registration files (§§ 10, 11, 16, 45, 47, 53, 54, 55) and in the indices or catalogues (§ 56). All these records "shall be open to public inspection." (§ 58). And—among other purposes—these records remain open to public inspection, in the event of a copyright renewal.

During the last forty-one years copyright registrations numbered over five million, and "have increased over fivefold." [14] In 1909, it was obviously necessary to enact legislation providing for disposal of some of the multitudinous accumulated copyrighted articles no longer necessary for the purpose of public disclosure. But far from showing a Congressional intent to permit copyright monopolies with no public governmental record available for public inspection, §§ 59 and 60 are the clearest and most conclusive evidence of a contrary purpose. They carried forward and emphasized once more the dual statutory purpose to require deposits for the use of the Library, and to preserve for the public the historic and wise policy that the ownership, nature and extent of private monopolies granted by government should always be spread upon government records open for public inspection.

Fourth. There remains the suggestion that administrative interpretation of the 1909 Act lends support to

[14] Annual Report, Register of Copyrights, 1938, p. 1.

the judgment here under which the statutory provisions for public registration and deposit are nullified. On the contrary, the rules and regulations promulgated by the Register of Copyrights under the 1909 Act have continuously and consistently recognized that registration and deposit are mandatory. From the first (1910) until the latest (1927) edition of these rules and regulations they have substantially provided as follows:

"*Promptly* after first publication of the work with the copyright notice inscribed, two complete copies of the best edition of the work then published *must be sent* to the Copyright Office, with the proper application for registration correctly filled out and a money order for the amount of the legal fee.

"The statute requires that the deposit of the copyright work shall be made 'promptly' which has been defined as 'without unnecessary delay.' It is not essential, however, that the deposit be made on the very day of publication." (Italics supplied.)[15]

But it is said that a letter from the Register of Copyrights to the Librarian of Congress—dated September 17, 1938—indicates a different interpretation of the Act by the Copyright Office. However, this letter does not purport to change the formal rules and regulations—in force and effect since 1910—which provide that deposit and registration "must" be "promptly" made. The 1909 Act gives the Register of Copyrights authority to promulgate rules and regulations but it does not give him authority to alter the law's meaning by communicating with the Librarian of Congress. Nor, in fact, does this letter represent an effort by the Register of Copyrights to change the rules and regulations dating from 1910. Practitioners in the Copyright Office, as well as the public generally,

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[15] Rules and Regulations of the Copyright Office, Bulletin No. 15, 1927. The word "promptly" was inserted in the first paragraph for the first time in 1917.

rely upon formal rules and regulations made available to the public. But whether they have access to interdepartmental communications such as the letter does not appear.

This interdepartmental communication bears the date of September 17, 1938. It appeared in public form for the first time January 4, 1939. Its appearance thus occurred nearly six years after the complaint in this suit was filed; more than eight months after the Circuit Court of Appeals decided that the statutory provisions for deposit were mandatory; almost three months after this Court granted certiorari; and twenty-nine days after the cause was argued and submitted for final decision by this Court. The communication is admittedly contrary to the only two court decisions which it cites on the precise question of the effect of failure to make deposit.[16] It does not represent an administrative practice consistently pursued, or an administrative interpretation of long standing, and therefore is not entitled to any weight in the construction of the 1909 Act. The administrative rules and regulations—to which we may look—have since 1910 consistently required that deposit "must" be made.

It is of far greater importance to the public today than it was in 1790, 1831, 1870, or 1891, that public record be made of copyright monopolies granted to further the arts and sciences, since these privileges have been extended by statute to include almost every conceivable type of production of the human mind.[17] It has been well

[16] Opinion of the court below; *Ebeling & Reuss, Inc.* v. *Raff*, unofficially reported, 28 United States Patent Quarterly, 366, (E. D., Penn.).

[17] The Act of 1909 as amended, 17 U. S. C., § 5, lists the following classes of works in which copyright may be claimed: Books, including composite and cyclopedic works, directories, gazetteers, and other compilations; Periodicals, including newspapers; Lectures, sermons, addresses (prepared for oral delivery); Dramatic or dramatico-

said that the "general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." [18] All voluntary communications become "free as the air to common use" unless protected by compliance with the copyright statutes. More than twenty-five years ago (1911) a careful and accurate survey of the copyright laws led to the conclusion that "For seventy-five years it has been the settled law of this country that protection under the copyright law is granted only to those who perform the conditions essential to a perfect copyright title." [19] No decision of this Court—previous to that of today—has questioned the consistent purpose of Congress to require "that the public should have notice, by a true and correct official registry, as to the real author or proprietor entitled to the enjoyment of such monopoly as against the public." [20] To grant monopoly privileges—by judicial construction—to those who fail to comply with statutory safeguards intended to protect the public against abuses of such privileges conflicts with statutory policy extending back to the beginning of the nation's history. An author is entitled to the benefit of every right afforded by copyright law, but only "upon complying with the provisions of" that law. Congress has provided for a grant of monopoly privileges under

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musical compositions; Musical compositions; Maps; Works of art; models or designs for works of art; Reproductions of a work of art; Drawings or plastic works of a scientific or technical character; Photographs; Prints and pictorial illustrations; Motion-picture photoplays; Motion pictures other than photoplays.

[18] Brandeis, J., dissenting, *International News Service* v. *Associated Press*, 248 U. S. 215, 250.

[19] *Louis Dejonge & Co.* v. *Breuker & Kessler Co.*, 191 F. 35, 36; aff'd, 235 U. S. 33.

[20] *Koppel* v. *Downing*, 11 App. D. C. 93, 104.

copyright for a term which may extend by renewal to fifty-six years for those who do comply. Petitioner having conceded that it disobeyed a plain requirement of the Act designed to inform and protect the public, I cannot agree that it should recover damages under the very law it admittedly disobeyed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED concur in this dissent.

UTAH FUEL CO. ET AL. *v.* NATIONAL BITUMINOUS COAL COMM'N ET AL.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 528. Argued January 3, 1939.—Decided January 30, 1939.

An order of the National Bituminous Coal Commission directed its secretary to make available to interested parties, for possible use in evidence in a hearing which was to be held by the Commission to determine the weighted average of the total costs per ton of coal produced in certain areas, certain cost and sales realization data theretofore furnished by producers pursuant to an order under § 10 (a) of the Bituminous Coal Act of 1937. Several producers, members of the Bituminous Coal Code, filed a bill in the District Court to enjoin the threatened disclosure. The bill alleged, *inter alia,* that the petitioners were without other adequate remedy (the order not being reviewable under § 6 (b) of the Act), and that they would sustain immediate and irreparable damage from such disclosure; and further, that the Commission's proposed action was arbitrary and unreasonable, unauthorized by the statute, and in violation of a promise of privacy inferable from the order under which the data were filed and the forms used for returns thereof. *Held:*

1. The suit was within the equity jurisdiction of the District Court. P. 59.

The jurisdiction of the District Court is to be determined by the allegations of the bill; and usually if the bill makes a claim which if well founded is within the jurisdiction of the court, then it is within that jurisdiction whether well founded or not.

2. It was within the power of Congress to authorize publication by the National Bituminous Coal Commission of cost and sales realization data filed by producers, and Congress did so authorize such publication by § 10 (a) of the Bituminous Coal Act of 1937. The order here attacked is valid and may not be enjoined. P. 61.

69 App. D. C. 333; 101 F. 2d 426, affirmed.

CERTIORARI, 305 U. S. 575, to review a decree affirming the dismissal of a bill for an injunction.

Mr. J. V. Norman, with whom *Mr. Robert E. Quirk* was on the brief, for petitioners.

Solicitor General Jackson, with whom *Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern* and *Hugh B. Cox* were on the brief, for respondents.

By leave of Court, *Mr. Clarence A. Miller* filed a brief on behalf of the Aberdeen & Rockfish Railroad Co. et al., as *amici curiae,* in support of respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioners are producers—engaged in the business of mining coal, and members of the "Bituminous Coal Code,"—that is "producers accepting membership in the Code." The National Bituminous Coal Commission, created by Act April 26, 1937 (Ch. 127, 50 Stat. 72), purporting to proceed under § 10 (a), on July 15, 1937 issued Order No. 15 which directed each producer of bituminous coal to file within fifteen days complete report showing for each mine detailed cost of tonnage produced and realization prices derived from sale, during 1936. This notice concluded—

"The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for

non-compliance with this order by the producer will be strictly enforced."

Approved forms were distributed to producers for returns to the order. They contained the following in bold type—"This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential." Petitioners made returns upon these forms.

March 30, 1938, the Commission announced that thereafter it would give public notice of a hearing to determine the weighted average of total cost of the tonnage of coal in the calendar year 1936 adjusted, etc. Further, that upon such hearing the information obtained from individual coal producers through Order 15 would be made available for inspection and introduction in evidence; that § 10 (a) of the Act was construed to authorize such disclosure.

Petitioners made formal objection to the March 30 action but the Commission after consideration announced adherence and ordered—

"That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

Deeming this proposed action unauthorized and relying upon § 6 (b) of the Act, one of the present petitioners with others asked review in the Court of Appeals, District of Columbia. That court held the challenged action was not reviewable by it and dismissed the petition August 1, 1938. *Mallory Coal Co.* v. *National Bituminous Coal Comm'n,* 69 App. D. C. 166; 99 F. 2d 399. August 31, 1938, the Commission ordered its secretary to make available for inspection to "interested parties who have

filed appearances in this proceeding," petitioners' cost, etc., reports returned under Order 15.

September 7, 1938 petitioners by bill filed in the District Court, District of Columbia, sought an injunction against the threatened disclosure. This set out the foregoing facts, stated that no adequate relief could be had elsewhere, and that petitioners would sustain immediate and irreparable damage if their reports were publicized. It further averred that the Commission's proposed action was unauthorized, arbitrary, unreasonable, and in flagrant violation of the statute also the promise of privacy inferable from Order 15 and the forms used for returns thereto.

The trial court held "the bill of complaint fails to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act," and dismissed it upon motion. The Court of Appeals concluded the District Court had no jurisdiction over the controversy and upon that ground approved the dismissal. 101 F. 2d 426. The matter is here by certiorari.

We are unable to accept the view of the Court of Appeals. The District Court correctly ruled that the bill fails to state a cause of action and for that reason properly directed the bill dismissed.

A question cognate to the one here presented was before us in *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, decided December 5, 1938, the date of the Court of Appeals' decision herein. We there declared, although determination by the Interstate Commerce Commission that a railroad was not "interurban" did not constitute an "order" reviewable under the Urgent Deficiencies Act of October, 1913,[1] nevertheless in the circumstances disclosed, it could be subjected to judicial review by bill in equity. "Equity jurisdiction may be invoked when it is

[1] 38 Stat. 208, 28 U. S. C. 41.

essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions."

Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be "determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 273; also *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305; *United States* v. *Archibald McNeil & Sons,* 267 U. S. 302, 307.

By admission, Congress could have authorized the Commission to disclose the details of reports concerning costs, etc. But petitioners insist that the Bituminous Coal Act conferred no such power; on the contrary definitely denies it.

The Act contains twenty-one sections and a schedule of districts. Section 4—"The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code', and are herein referred to as the code." "Part II—Marketing" of this declares—

"The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

"(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical

bureau as the confidential records of the code member filing such information.

"For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. . . ."

Section 10 (a)—

"The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission."

Counsel submit an ingenious argument to show that as petitioners are code members their returns to Order 15 are not within the ambit of § 10 and must be treated as if presented under § 4, Part II (a) and therefore confidential. Also, that the challenged action of the Board conflicts with the words, spirit and general purposes of the enactment.

We have examined the argument but cannot conclude that the reasons advanced are adequate to support the point taken.

The language of § 10 (a) applies to all producers and we think allows what the Board proposes. It harmonizes rather than conflicts with the general purposes of the statute to permit action by the Board only upon full information. Obviously publication may be harmful to

petitioners but as Congress had adequate power to authorize it and has used language adequate thereto we can find here no sufficient basis for an injunction.

Upon the ground and for the reasons herein stated the decree of the District Court is

Affirmed.

MR. JUSTICE BLACK, concurring.

I concur in the affirmance of the decree of the District Court. For reasons stated in the opinion of the Circuit Court of Appeals,[1] I believe that Court properly found the District Court without jurisdiction.

FELT & TARRANT MANUFACTURING CO. *v.* GALLAGHER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 302. Argued December 13, 1938.—Decided January 30, 1939.

An Illinois corporation, not qualified to do local business in California, solicited orders for its goods from California purchasers, through agents for whom it hired offices in that State, and who took the orders subject to the vendor's approval. Goods sold were sent by the vendor from outside of California directly to the purchasers or to the agents for distribution to them. Prices were paid to the vendor directly, in Illinois. *Held* that California constitutionally may apply to such nonresident corporation the provision of its Use Tax Act requiring retailers maintaining a place of business in the State, and making sales of tangible personal property for storage, use or other consumption therein, to collect from the purchasers the taxes imposed. P. 64.

The Act, so applied, is consistent with the commerce clause, and with the due process clause of the Fourteenth Amendment. 23 F. Supp. 186, affirmed.

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[1] 101 F. 2d 426.

APPEAL from a District Court of three judges dismissing a bill to enjoin appellees from enforcing a tax Act.

Mr. A. Calder Mackay, with whom *Mr. Thomas R. Dempsey* was on the brief, for appellant.

The three cases upon which the lower court relied as authority for the denial of the injunctive relief sought by the appellant, *Henneford* v. *Silas Mason Co.,* 300 U. S. 577; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642; and *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, are not applicable to the case at bar.

In each of those cases the corporation subjected to the tax was within the jurisdiction of the taxing state and was transacting an intrastate business. The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as it transacts in California is interstate in character.

California, therefore, lacks the power to require the appellant (1) to act as the State's collecting agent with respect to use tax which may become due from California storers, users or consumers; or (2) to insure payment of such tax if it fails to make collection from the tax debtors; or (3) otherwise to act as a "retailer" as defined by the Act and the appellees.

The treatment of the appellant as a retailer subject to the provisions of the Act is a direct burden upon interstate commerce. Numerous provisions of the statute, if applied to the appellant, would deprive it of its property without due process of law. The action of the lower court in denying injunctive relief was erroneous.

Mr. James J. Arditto, Deputy Attorney General of California, with whom *Messrs. U. S. Webb,* Attorney General, *H. H. Linney,* Deputy Attorney General, and *Roger J. Traynor* were on the brief, for appellees.

By leave of Court, *Mr. Jesse H. Steinhart* filed a brief, as *amicus curiae,* in support of appellant.

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant seeks an injunction prohibiting the state officers from enforcing against it the California Use Tax Act of 1935. (Cal. Stat. 1935, ch. 361, as amended by Cal. Stat. 1937, ch. 401, 671 and 683.) Counsel do not question the right of the state to collect this tax from the user, etc., but they say that, in the circumstances here disclosed, the officers may not compel appellant to serve as an agent for collecting the tax as they are threatening to do.

The trial court, three judges, dismissed the bill upon motion.

It appears—

Appellant, an Illinois corporation, is engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union. As stated by the court below its method of doing business with respect to California purchasers is substantially as follows:

"Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ sub-agents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent, provided the lease to the same has been approved by it, such of-

fice to be used exclusively in furthering its business; also agrees to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff, and also to reimburse each general agent to the extent of part of the monies advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator. Plaintiff assumes no other financial obligation with respect to sub-agents and demonstrators. Under this contract the general agent must devote his entire time and attention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. The contract further requires the general agent to maintain certain records, and make certain reports and make a specified minimum number of calls on prospective customers."

And further "That each of these two general agents maintains an office in this State, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the State. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as

demonstrators. Plaintiff has never qualified to do intrastate business in California."

The Use Tax Act (§ 6) directs retailers maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption therein, to collect from the purchaser the tax imposed.

Appellant presents for our consideration two points: (1) The statute as construed and applied by the appellees to the appellant is repugnant to Art. I, § 8, clause 3 of the Federal Constitution. (2) The threatened enforcement of the statute would deprive appellant of his property without Due Process of Law contrary to the Fourteenth Amendment.

The argument is this—

The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as it transacts in California is interstate in character. California, therefore, lacks the power to require it (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collections from the tax debtors, or (3) otherwise to act as a "retailer" as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution. Numerous provisions of the statute, if applied, would deprive appellant of its property without due process of law.

The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 650, *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93, 95, and *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582, 583. And we agree with that conclusion.

Henneford v. *Silas Mason Co.* upheld a Washington statute similar to the one under consideration. The opinion declared (pp. 582, 583)—

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. . . . This is so, indeed, though they are still in the original packages. . . . For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment. . . . A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

Bowman v. *Continental Oil Company* recognized the right of the state to require a distributor "to render detailed statements of all gasoline received, sold, or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated."

Monamotor Oil Co. v. *Johnson* upheld an Iowa statute. The complainant there sought an injunction prohibiting tax officers from requiring the distributor of motor oil received from another state to pay into the state treasury the tax levied upon the consumer. This Court said (pp. 93, 95), "There is no substance in the claim that the statutes impose a burden upon interstate commerce . . . The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that

purpose. This is a common and entirely lawful arrangement. . . . The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

The challenged judgment must be

Affirmed.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this cause.

UNITED STATES *v.* DURKEE FAMOUS FOODS, INC.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 309. Argued January 10, 11, 1939.—Decided January 30, 1939.

The Act of May 10, 1934, provides that when an indictment is found insufficient after the period of the statute of limitations has expired, a new indictment may be returned during the next succeeding term following such finding, during which a grand jury shall be in session. *Held* that this does not authorize reindictment at the same term during which the first indictment was found defective. P. 69.

Affirmed.

APPEAL, under the Criminal Appeals Act, from a judgment sustaining a plea in bar to an indictment.

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* Together with No. 310, *United States* v. *Manhattan Lighterage Corp.*, and No. 311, *Colgate-Palmolive-Peet Co.* v. *United States*, also on appeal from the District Court of the United States for the District of New Jersey.

Mr. Elmer B. Collins, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. N. A. Townsend* and *W. Marvin Smith* were on the briefs, for the United States.

Messrs. Frank M. Swacker and *Roger Hinds,* with whom *Messrs. Albert C. Wall, Thomas G. Haight, John A. Hartpence,* and *Mason Trowbridge* were on the briefs, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The identical questions involved in these three cases require consideration of the Act December 27, 1927, (ch. 6, 45 Stat. 51, U. S. C. Title 18 § 582) which prescribes a three year limitation for offenses not capital; also the Act May 10, 1934 (ch. 278, 48 Stat. 772, U. S. C. Title 18 § 587) which specifies the time during which a new indictment may be returned after the first is found to be defective or insufficient for any cause.[1]

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[1] Chapter 278:—AN ACT To limit the operation of statutes of limitations in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

Sec. 2. Whenever an indictment is found defective or insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which such indictment was returned, a new indictment may be returned not later than the end of the next succeeding term of such court, regular or special, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session.

Sec. 3. In the event of reindictment under the provisions of this Act the defense of the statute of limitations shall not prevail against

Reference to the facts disclosed by the Record in No. 309 will suffice.

During the April term 1934 the Grand Jury for the District of New Jersey returned an indictment charging appellee with violation of the Elkins Act (February 19, 1903, ch. 708, 32 Stat. 847, U. S. C. Title 49 § 41) on August 17, 1932. A motion to quash this was sustained, February 2, 1937, during the January, 1937 term. Later in the same term—April 9, 1937—the Grand Jury returned a second indictment against appellee based on the same facts and containing the same charges as those specified in the 1934 indictment.

To the second indictment appellee interposed what it designated a plea in bar. This alleged (1) that as the offense charged was committed more than three years preceding the return of the pending indictment prosecution was barred by the statute of limitations; (2) that the new indictment was not returned in conformity with the Act May 10, 1934 (note 1, *supra*), since it was reported at the term during which the first indictment was found defective—not at the succeeding one. This plea was sustained and the cause is here by direct appeal.

Counsel for appellants submit—

The Act May 10, 1934 prevented the bar of the statute of limitations from becoming effective until the end of the term next succeeding that during which the first indictment was quashed. The ruling of the trial court (1) is contrary to the purpose of the Act and not required by its language; (2) is contrary to the policy and frustrates the general object of the statute of limitations "to encourage promptitude in the prosecution of remedies";

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the new indictment, any provision of law to the contrary notwithstanding.

Sec. 4. The provisions of this Act shall not apply to any indictment against which the statute of limitations has run at the date of approval hereof.

Approved May 10, 1934.

(3) creates unnecessary inconsistency between the two sections of the Act, and results in an illogical and unreasonable break within the period of limitation.

The Act of 1934 was passed upon recommendation of the Senate Judiciary Committee whose report stated that the purpose of the bill was set out in a letter from the Attorney General which it quoted.[2]

Inspection of this letter shows quite plainly that the bill as finally enacted undertook to do exactly what the Attorney General asked. The language is apt to express that purpose and we are without authority, by interpretation, to give the statute another meaning.

The challenged judgments must be

Affirmed.

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[2] JANUARY 17, 1934.

Hon. HENRY F. ASHURST,
Chairman Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR: In some criminal cases the offense is not discovered until the statute of limitations has nearly run. In other cases defendants are not apprehended for some time or removal proceedings are instituted and appeals taken from habeas corpus orders refusing to release the defendant on removal order, and in still other cases dilatory motions are made with the hope that, if ultimately sustained, the statute of limitations will meanwhile have run against another prosecution. To safeguard the interests of the Government in such cases, legislation is recommended providing that in any case in which an indictment is found defective or insufficient for any cause, after the period prescribed by the statute of limitations has run, or where said period of limitations has not run but will expire before the end of the next regular session of court, a new indictment may be returned at any time during the first succeeding term of court at which a grand jury is in session. The judicial conference favors legislation of this tenor.

A draft of bill to effectuate this recommendation is enclosed herewith and I shall appreciate it if you will introduce it and lend it your support.

Respectfully,

HOMER CUMMINGS,
Attorney General.

DIXIE OHIO EXPRESS CO. *v.* STATE REVENUE COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 260. Argued December 16, 1938.—Decided January 30, 1939.

The Georgia Maintenance Tax Act, as applied to appellant, an Ohio corporation engaged exclusively in interstate commerce as a common carrier of property by motor vehicle for hire, imposes a tax of $50 on each ton-and-a-half motor vehicle, $75 on each two-ton motor vehicle, and $50 on each trailer of 4000 pounds factory weight. The tax would be the same if the carrier were engaged exclusively in intrastate commerce, or were engaged in interstate and intrastate commerce, but would be less if the vehicles were not used for hire. *Held:*

1. While a State may not impose a tax on the privilege of engaging in interstate commerce, it may validly impose a fair and reasonable tax upon vehicles as compensation for the use of its highways, even though the vehicles be used exclusively in interstate transportation. P. 76.

2. To sustain an exaction by the State for the use or privilege of using its highways for interstate transportation, it must affirmatively appear that the charge is for compensation or to pay the cost of policing the highways. P. 77.

3. The scope and language of the Act clearly disclose that its purpose is to require compensation for the privilege of operating over the roads of the State. P. 77.

4. The fact that the State, in the conduct of its fiscal affairs, chooses to use part or all of the proceeds of the tax for the improvement of roads other than those over which appellant operates, does not render it violative of the commerce clause. P. 77.

5. The amounts paid by the appellant for license tags, public service tags, and gasoline taxes are without significance in this case. P. 78.

6. The fact that, in license and fuel taxes, motor vehicles bore over 62 per cent. of the total taxes collected by the State, does not aid in ascertaining the value of appellant's use of, or privilege to use, the State's highways. P. 78.

7. Figures showing the extent of appellant's use of the State's roads may not be taken as an indication of the value of the

privilege where it does not appear whether the privilege was fully availed of. P. 78.

8. Failure of the appellant to furnish evidentiary details on the issue tends to support the State's claim that the exaction was reasonable compensation for the privilege of use of its roads. P. 78.

9. The imposition of higher taxes on vehicles used for hire than on those not so used is not an arbitrary classification and does not violate the equal protection clause of the Fourteenth Amendment. P. 78.

186 Ga. 228; 197 S. E. 887, affirmed.

APPEAL from a judgment affirming a judgment which sustained a demurrer and dismissed an affidavit challenging the legality of a levy of execution by the state revenue commission.

Mr. Edgar Watkins, with whom *Mr. Allan Watkins* was on the brief, for appellant.

Mr. O. H. Dukes, with whom *Messrs. M. J. Yeomans,* Attorney General of Georgia, and *B. B. Zellars,* Assistant Attorney General, were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question is whether, as applied in this case by the highest court of the State, the Georgia Maintenance Tax Act [1] violates the commerce clause or the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

Appellant is an Ohio corporation engaged exclusively in interstate transportation as a common carrier of property for hire by motor vehicles, including hauling between points in Georgia and points in other States. A certificate of convenience and necessity issued by the Interstate Commerce Commission authorizing appellant's in-

[1] Laws 1937, p. 155.

terstate transportation in Georgia,[2] does not extend to transportation over rural post roads, which are roads not included in the state highway system over which United States mail is carried.[3]

Appellant owns for use in its business about 100 pieces of equipment consisting of trucks and tractors with manufacturer's rated capacity of a ton and a half and two tons and trailers having factory weight of 4,000 pounds. If used to haul not for hire, the tax on each ton-and-a-half motor vehicle is $15; on each two-ton vehicle, $30; and on each trailer, $30. But when used to haul either as a common or contract carrier for hire, the taxes are respectively, $50, $75, and $50. § 3.

For the collection of tax on one of appellant's two-ton trucks, the state revenue commission obtained from the superior court of Fulton County an execution on which it caused the sheriff to levy upon that vehicle. Appellant gave a bond to the sheriff with an affidavit of illegality.[4] In order to avoid seizure of all of appellant's equipment, the state commission allowed it to deposit in escrow the amount claimed under the Act on account of other equipment and agreed that levy should be made only on the one truck. The commission demurred; the superior court sustained the demurrer and dismissed the affidavit. The supreme court affirmed. 186 Ga. 228; 197 S. E. 887.

In addition to the description of appellant's equipment, operations, and use of Georgia highways given above, the statements of the affidavit of illegality, so far as concerns the issues here to be decided, may be summarized as follows:

The Act directs that upon payment of the maintenance tax the director of the motor vehicles division of the state

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[2] § 206, Motor Carrier Act, 1935, c. 498, 49 Stat. 551, 49 U. S. C. § 306.

[3] Laws 1937, p. 914.

[4] Code 1933, § 92–7301.

commission shall issue a tag (§ 9), and that the money derived from the sale of these tags shall be allocated to the United States rural postal roads division of the Georgia highway department. § 11. Thus, no part of it is applicable to highways over which appellant operates. The maintenance taxes on its equipment for each year will be about $6,000. In addition, the Georgia laws require it to pay $3 for a license tag [5] and $25 for a public service tag [6] for each vehicle and six cents per gallon of gasoline purchased in Georgia; [7] it annually buys in that State about 90,000 gallons. Two-thirds of the gasoline tax is for maintenance of state aid highways.[8] Appellant hauls in seven States; annually its trucks travel an average of 6,870,000 miles of which 725,000, less than 11 per cent of the total, are in Georgia. The 1936 total taxes collected by Georgia amounted to $30,058,092.68, of which motor vehicles bore $19,207,909.59 in license and fuel taxes.

In conclusion, the affidavit asserts that the tax in question is an unreasonable fee for appellant's use of the roads and is therefore repugnant to the commerce clause, and that it discriminates against carriers for hire in favor of carriers not for hire and for that reason violates the equal protection clause of the Fourteenth Amendment.

1. Is the Act repugnant to the commerce clause?

With exceptions not material here, it requires that all who own or have exclusive right to use for more than 30 days a motor bus, truck,[9] or trailer "shall pay a maintenance tax for operation . . . upon and over the public

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[5] Laws 1935, p. 157.

[6] Code 1933, § 68–623.

[7] Laws 1937, p. 174.

[8] Laws 1937, p. 180.

[9] The Act defines "truck" to "include any self-propelled vehicle designed . . . for drawing other vehicles, but having no provision for carrying loads independently, except what are commonly known as farm tractors." § 2B.

roads of the State" (§ 1) according to a schedule (§ 3) which specifies the amount of the tax on each vehicle. The Act makes no distinction between vehicles used in intrastate commerce and those used in interstate commerce. It discriminates in favor of equipment used not for hire. It lays upon trucks and tractors taxes graduated according to manufacturer's rated capacities and upon trailers amounts graduated according to factory weights. The tax imposed on appellant is the same as if it operated exclusively in intrastate commerce or carried on both intrastate and interstate transportation.

It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce. *Sprout* v. *South Bend,* 277 U. S. 163, 171. *Interstate Transit, Inc.,* v. *Lindsey,* 283 U. S. 183, 185. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, and cases there cited; also those cited in the concurring opinion. But, consistently with the commerce clause, a State may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax as compensation for the privilege of using its highways for that purpose. The applicable principle is stated in *Hendrick* v. *Maryland,* 235 U. S. 610. We there said (pp. 623–624): "In view of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce." That rule has been applied in many cases. See e. g. *Kane* v. *New Jersey,* 242 U. S. 160, 168–169. *Clark* v. *Poor,* 274 U. S. 554, 557. *Sprout* v. *South Bend, supra,* 170. *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285,

289. *Morf* v. *Bingaman,* 298 U. S. 407, 412. While ordinarily state action is deemed valid unless the contrary appears, we have held that to sustain a charge by the State for the use or privilege of using its roads for interstate transportation, it must affirmatively appear that the charge is exacted as compensation or to pay the cost of policing its highways. *Sprout* v. *South Bend, supra. Interstate Transit, Inc.* v. *Lindsey, supra,* 186. *Ingels* v. *Morf,* 300 U. S. 290, 294.

The scope and language of the challenged enactment unmistakably disclose intention of the State to require payment of compensation for the privilege of operating over its roads the specified vehicles for the transportation of property. It contains no hint of hostility to interstate commerce or of purpose to impose a charge on the privilege or business of interstate transportation. The exaction is not to be deemed offensive to the commerce clause merely because the State, in the conduct of its fiscal affairs, chooses to use part or all of the proceeds for purposes other than the construction, improvement, or maintenance of its highways. *Clark* v. *Poor, supra,* 557. *Morf* v. *Bingaman, supra,* 412.

The affidavit of illegality fails to allege any facts tending to show that a reasonable charge for the privilege is less than the amount exacted for it. Appellant does not claim that the privilege to operate for a year 100 pieces of its equipment over any or all the State's roads is not worth $6,000, the amount of the taxes in controversy. It does not disclose what the taxes in question amount to per truck, tractor, or trailer mile, per ton hauled, or per ton mile, nor does it compare the amount of the taxes with total operating expenses or with operating revenues. The figures furnished indicate that the tax imposed on account of the use of each vehicle amounts to about 20 cents a day and that, on appellant's business in 1936, it was about eight mills per vehicle mile. The

amounts paid for license tags, public service tags, and taxes on gasoline are without significance in this case. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 251–252. The allegation to the effect that in 1936 motor vehicles in Georgia bore, in license and fuel taxes, over 62 per cent of the total taxes collected by the State is too vague for use in any estimate of or study for the ascertainment of the value of appellant's use, or of its privilege to use, the State's roads.

Appellant's failure to disclose whether it fully availed itself of the privilege to use the roads leaves the figures reflecting actual use without foundation and worthless as a measure or indication of the value of that privilege. And, in view of the seemingly low charge for the operation of its vehicles per day or mile, its failure to furnish evidentiary details material to the issue of reasonableness makes against its contention that the challenged exactions so exceed the worth of the granted use of the roads that they are to be deemed taxes on the privilege of carrying on its business of interstate transportation and tends to confirm appellee's claim that they constitute pay for the specified operations over the State's roads.

We find that the challenged enactment does not violate the commerce clause.

2. Is the Act repugnant to the equal protection clause? Appellant insists that it is because of the higher taxes imposed on those who haul for hire. But it fails to show lack of facts sufficient to justify the discrimination. In the absence of proof to the contrary, it is to be assumed that the use of the roads by one hauling not for hire is generally limited to transportation of his own property as an incident to his occupation or business and that it is substantially less than that of one who is engaged in the business of common carrier thereon for hire. As hauling not for hire is likely to be occasional and accessory and as hauling for hire is a business the success

of which depends on the loading of the vehicles used and mileage made by them, the classification complained of may not be held arbitrary or without reasonable foundation. *Morf* v. *Bingaman, supra,* 413. *Aero Transit Co.* v. *Georgia Comm'n, supra,* 290, 291. *Hicklin* v. *Coney,* 290 U. S. 169, 176, 177. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370, 371, *et seq.* *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92, 97. *Alward* v. *Johnson,* 282 U. S. 509, 513–514. *Bekins Van Lines* v. *Riley,* 280 U. S. 80, 82. *Packard* v. *Banton,* 264 U. S. 140, 144. Appellant's contention that the Act violates the equal protection clause is without merit.

Affirmed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

H. P. WELCH CO. *v.* NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 295. Argued January 3, 1939.—Decided January 30, 1939.

A statute of New Hampshire forbids the owner of any motor vehicle used on the highways of the State in the transportation of property for hire, to require or permit to operate such vehicle a driver who has been continuously on duty for more than 12 hours. Registration certificates, without which no common or contract carrier may lawfully operate over the highways of the State, may be suspended or revoked for violations. The statute exempts: those transporting products of their own manufacture or labor; motor vehicles not principally engaged in the transportation of property for hire; and carriers operating exclusively in a city or town or within 10 miles thereof, or beyond the 10 mile limit on not more than two trips in 30 days. *Held*:

1. As applied to a carrier which was not exempt, the statute was not by reason of its exemptions repugnant to the equal protection clause of the Fourteenth Amendment. P. 82.

2. Enforcement of the statute against an interstate motor carrier for violations committed subsequently to the passage of the federal Motor Carrier Act, 1935, but prior to the effective date (and the date of issue) of an order of the Interstate Commerce Commission, pursuant thereto, prescribing maximum hours of service of employees of such carriers, was valid. P. 83.

3. Congress will not be deemed to have intended that state regulatory measures relating to safety on the highways should be superseded prior to the effective date of similar federal regulation. P. 85.

89 N. H. 428; 199 A. 886, affirmed.

APPEAL from a judgment dismissing an appeal from an order of the Public Service Commission of New Hampshire suspending the registration certificates of a motor carrier for violation of the state law.

Mr. Robert W. Upton for appellant.

Messrs. Dudley W. Orr and *John E. Benton,* with whom *Mr. Thomas P. Cheney,* Attorney General of New Hampshire, was on the brief, for appellee.

By leave of Court, *Messrs. Clyde S. Bailey* and *John E. Benton* filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* in support of appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

A statute of New Hampshire [1] declares unlawful the operation on its roads of motor vehicles for specified transportation by drivers who have been continuously on duty for more than 12 hours. By this appeal we are called on to decide whether, as applied in this case, §§ 3, 4, and 8 are repugnant to the equal protection clause of the Fourteenth Amendment, and whether §§ 8 and 11

[1] Laws 1933, c. 106 as amended by c. 169.

were superseded by the federal Motor Carrier Act, 1935, § 204,[2] and regulations prescribed under it by the Interstate Commerce Commission.

The New Hampshire Act declares that the number of motor vehicles operated by carriers for hire has made regulation necessary to the end that its highways may be safer for use by the general public. § 1. It requires common and contract carriers between points within the State to register their trucks with the public service commission. § 2. Contract carriers include those, other than common carriers, who haul for hire by motor vehicle on any road of the State. § 3. Exempted from the challenged regulation are those transporting products of their own manufacture or labor (§ 3), and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town or within 10 miles of its limits or beyond the 10-mile limit on not more than two trips in 30 days. § 4.

Section 8 declares that "It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty." Section 11 provides that for violations of the Act the commission shall have authority after notice and hearing, to suspend or revoke any registration certificate.

Appellant is a Massachusetts corporation doing intrastate and interstate business as a common and contract

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[2] 49 Stat. 546; 49 U. S. C. § 304.

carrier of freight for hire by motor vehicles over public highways in that State and in New Hampshire. Approximately 99 per cent of its business is interstate. It has terminals at Boston in Massachusetts, and at Manchester, Concord, and Claremont in New Hampshire. In 1937 it obtained from the New Hampshire commission registration certificates for 20 trucks. After notice and hearing, the Commission, in a decision filed as of December 11, 1937, held appellant had violated the provisions of § 8 and ordered that its certificates be suspended for five days. Appellant appealed to the state supreme court. That court upheld the challenged provisions and dismissed the appeal. 89 N. H. 428; 199 A. 886.

1. Sections 3, 4, and 8 are not repugnant to the equal protection clause. The state court found that the purpose of § 8 is "to protect users of the highways of this State from the danger likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue." Appellant's contention is that the discrimination between drivers of motor carriers for hire subject to § 8 and those exempted by §§ 3 and 4, has no fair or substantial relation to highway safety. It suggests, and we may assume, that the roads of New Hampshire are extensively used for transportation by trucks not regulated by § 8; that drivers of them are just as susceptible to fatigue from long hours of continuous operation as are those operating the trucks used by appellant and other common carriers for hire, and that the dangers attributable to fatigued drivers are the same in one class of service as in another. Appellant has failed to show that, in operations to which § 8 applies, continuous driving for more than 12 hours is not so much more prevalent than in those exempted (§§ 3, 4) as to constitute a reasonable basis for the differentiation. We are of opinion that, for reasons given above, those stated by the state supreme court in this case and by

this Court in *Dixie Ohio Express Co.* v. *Georgia Comm'n, ante,* p. 72, the classification in question does not conflict with the rule of equal protection.

2. As applicable to the violations of the state law found to have been committed by appellant, §§ 8 and 11 were not superseded by the federal Motor Carrier Act, 1935, or the regulations made under it by the Interstate Commerce Commission.

That Act became law August 9, 1935. Under the caption "General Duties and Powers of the Commission," § 204 (a) declares: "It shall be the duty of the Commission . . . to regulate" common and contract carriers by "motor vehicle . . . and to that end the Commission may establish reasonable requirements with respect to . . . qualifications and maximum hours of service of employees, and safety of operation and equipment." By order made under authority of that section December 29, 1937, the Commission prescribed regulations as to maximum hours of service of drivers of motor vehicles operated in interstate commerce by common and contract carriers.[3] These regulations were modified July 12, 1938 [4] and their effective date has been postponed to January 31, 1939.[5] With exceptions that need not be stated here, they declare that no common carrier shall permit or require any driver to remain on duty for more than 60 hours a week or more than 10 hours in any period of 24 consecutive hours.[6]

Appellant does not suggest that prior to congressional action the State was without power, for protection of persons and property, to regulate use of its roads as provided in § 8, and to enforce obedience in accordance with § 11. *Cooley* v. *Board of Wardens,* 12 How. 299, 320.

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[3] 3 M. C. C. 665.

[4] Ex Parte No. MC–2, July 12, 1938.

[5] Ex Parte No. MC–2, December 22, 1938.

[6] Ex parte No. MC–2, July 12, 1938 (Rule 3 (a) and (b)).

Smith v. *Alabama,* 124 U. S. 465. *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois,* 177 U. S. 514. The violations for which the state commission suspended appellant's registration certificates occurred after the effective date of the federal Act and before the Interstate Commerce Commission made its order. Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the state commission, that when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute. Then, the sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce. Our decisions provide no formula for discovering implied effect of federal statutes upon state measures such as that under consideration. Here, the way is made clear by the language and context considered in connection with existing conditions. Section 204 (a) definitely imposes upon the Commission the duty to "regulate" but merely authorizes it to establish reasonable requirements with respect to, inter alia, qualifications and maximum hours of service of employees and safety of operation and equipment. The distinction intended between duty imposed and action permitted is more striking in view of the matters that, along with qualifications and hours of service of drivers, are committed to the discretion of the Commission. They include transportation of baggage and express, uniform systems of accounts, records, and reports, and preservation of records.

The roads belong to the State. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. Unquestionably, reasonable regulation of periods of continuous driving is an appropriate measure. In view of the

efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. *Mintz* v. *Baldwin,* 289 U. S. 346, 350. The rule applicable is clearly stated in *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 510: "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." We have frequently applied that principle. See e. g. *Reid* v. *Colorado,* 187 U. S. 137, 148. *Missouri Pacific Ry. Co.* v. *Larabee Mills Co.* 211 U. S. 612, 621, *et seq. Missouri, K. & T. Ry. Co.* v. *Harris,* 234 U. S. 412, 418–419. *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 139. *Northwestern Bell Tel. Co.* v. *Nebraska Ry. Comm'n,* 297 U. S. 471, 478. *Kelly* v. *Washington,* 302 U. S. 1, 10, *et seq.* Appellant cites *Northern Pacific Ry. Co.* v. *Washington,* 222 U. S. 370, 378; *Erie Railroad Co.* v. *New York,* 233 U. S. 671; *Oregon-Washington Co.* v. *Washington,* 270 U. S. 87; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 613; and *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341, 345. In each, the facts differ so widely from those of the case before us that no discussion is required to show that it is not in point.

Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways.

Affirmed.

MACKAY RADIO & TELEGRAPH CO. *v.* RADIO CORPORATION OF AMERICA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 127. Argued December 14, 15, 1938.—Decided January 30, 1939.

1. Carter patent, No. 1,974,387, for a directive antenna system for use in radio communication, *held* not infringed by petitioner's antenna structures. Pp. 88, 101.

   Claims 15 and 16 are invalid so far as they claim antennae of wire lengths intermediate of multiples of half wave lengths. And so far as the patent discloses and claims invention of a V antenna structure made in conformity to the Abraham formula, petitioner's structures do not infringe, for none of them conforms to the Abraham formula. One has wires which are an integral number of half wave lengths long, but uses an angle 10% smaller than that derivable from the Abraham formula; all of the others have wires which are not multiples of half wave lengths long and angles not derivable from the formula.

2. The disclosure of the Carter patent was that the best directional radio propagation by the V type antenna is obtained in the direction of its bisector, with a structure in which the angle of the wires, their length, and the length of wave propagated are in a definite mathematical relationship expressed by a formula disclosed in the specifications. The formula shows that the appropriate angle between each of the antenna wires and their bisector depends upon the wave length to be propagated and the wire length, which is a multiple of half wave lengths. The formula had been developed and published by Abraham thirty years previously. Lindenblad had taught that with an arrangement of antenna wires at an angle, radiation will occur in the direction of the bisector of the angle and that the preferred angle was dependent upon an indicated relationship between wire length and wave length. Carter's invention therefore, if it was invention, consisted in taking the angle of the Abraham formula as the angle between each wire of the V antenna and its bisector, and thus establishing along the bisector the greatest directional radio activity. The empirical formula of the specifications and Claims 15 and

16, derived graphically from the Abraham formula, disclosed no invention other than the application of the Abraham formula to the V antenna when wave length and wire length are known. *Held*, assuming that it was more than the skill of the art to combine the teaching of Abraham with that of Lindenblad and others who had pointed out that the arrangement of the wires at an angle enhanced directional radio activity along their bisector, then the invention was a narrow one, consisting of a structure conforming to the teachings of the Abraham formula as to angle and wire length relative to wave length, and is to be strictly construed with regard both to prior art and to alleged infringing devices. Carter, avoiding prior art by defining his angle for antennae with wires of particular wave lengths with mathematical precision, can not discard that precision to establish infringement. Pp. 94, 102.

3. The application of Carter, at least before the amendments introduced subsequently to the commencement of the present litigation, can not be construed as embracing structures not conforming to the Abraham formula. And the attempt by amendment to extend the claims, based on the application of the empirical formula (derived from the Abraham formula) to wire lengths not multiples of half wave lengths, must fail, because it involved a departure from what Carter's application had described as his invention, and a contradiction of it. P. 98.
4. It is unnecessary in this case to decide the further question whether petitioner's structures avoid infringement because the direction of their principal radio activity is not in the plane of the wires. P. 102.

96 F. 2d 587, reversed.

CERTIORARI, 305 U. S. 582, to review a decree which modified and reversed a decree of the District Court, 16 F. Supp. 610, dismissing the bill in a suit to enjoin infringements of patents.

Mr. Samuel E. Darby, Jr., with whom *Messrs. Hugh M. Morris* and *Paul Kolisch* were on the brief, for petitioner.

Mr. Jo. Baily Brown, with whom *Mr. Abel E. Blackmar, Jr.* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.*

The questions presented for decision by the petition for certiorari are whether the Carter patent, No. 1,974,-387, of September 18, 1934, for a directive antenna system for use in radio communication, is valid and is infringed by antennae structures used by petitioner in such communication.

Respondent brought the present suit in the District Court for eastern New York to enjoin infringements of four patents relating to radio antennae or their operation. Two were those of Carter and two those of Lindenblad. Of these only the second Lindenblad patent, No. 1,927,-522, of September 19, 1933, for an antenna for radio communication, is of present importance. When the suit was begun the application for the third Carter patent, with which we are presently concerned, was pending. After petitioner had answered and respondent, as a result of the litigation, had acquired knowledge of the particulars of the structure and operation of petitioner's antennae, Carter, respondent's assignor, amended the statement of his invention in his application so as in terms to embrace a differentiating feature of petitioner's structures. After this patent was issued respondent was permitted to file a supplemental bill charging infringement of it. The suits were consolidated, and the parties proceeded to trial on the issues of the validity and infringement of all five patents.

After taking the voluminous testimony of numerous witnesses, the trial court found that none of the patents in suit was infringed and decreed that the suits be dismissed. 16 F. Supp. 610. It held that none of them was a pioneer patent; that none had been employed by any one; that respondent's commercial structures did

* Opinion reported as amended by order of March 6, 1939, *post*, p. 618.

not follow the teachings of any of them; and that consequently they were not entitled to a broad construction. With respect to the Carter patent in suit it said: "The disclosure and the claims were broadened not only contrary to their original terminology but to their spirit as well." And ". . . by those amendments the plaintiff attempted to mold the third Carter patent both as to disclosure and claims, to cover defendant's antenna systems. This could not lawfully be done."

On appeal from so much of the decree as related to the second Lindenblad patent and the third Carter patent, the Court of Appeals for the Second Circuit affirmed as to the Lindenblad patent, but reversed as to the Carter patent, holding Claims 15 and 16 valid and infringed. 96 F. 2d 587. We granted certiorari, 305 U. S. 582, because of the nature and importance of the case, on a petition which urged as grounds for its allowance that validity and infringement of the Carter patent were in doubt and that, as petitioner is the only competitor of respondent in the business of world wide public radio communication, further litigation, resulting in conflict of decision among circuits, was improbable.

In ordinary broadcasting, radio waves are projected in all directions from the sending station. In radio communication it is advantageous and has long been the practice to use a directive antenna by which the waves of radio activity emanating from it are projected as a beam in the direction of the receiving station. In practice the beam is directed at an angle from the earth's surface toward the ionized layer of the stratosphere, or Heaviside layer, from which the beam is deflected toward the earth's surface in the compass direction of the receiving station. In more recent years it has been the practice to use relatively short wave lengths for radio communication.

The radio waves are generated at the sending station by feeding an oscillating electric current of appropriate character into the wire or wires of the antenna. The electric waves in the wires energize radio activity, which the antenna projects as radio waves toward the receiving station. By modulating or interrupting the current, corresponding modulation or interruption of the radio waves is effected, which may be used as a means of transmitting any desired signal. The waves, as modulated, impinge on the antenna of the receiving station devised to receive and utilize them as a means of controlling, with corresponding modulation, an electric current which in turn actuates a mechanism contrived to give audible or visual expression to the transmitted signal.

The effective part of the antenna is a copper wire from which the radio waves are radiated, supported on towers or poles at a height above the ground depending on the wave length used. The wire may be parallel with the earth, or vertical, or arranged at an angle, depending upon the function to be performed. Before Carter, antennae of two or more wires in varying arrangement had been used. The second Lindenblad patent showed an antenna of two wires arranged at an angle in the form of a V or an X, and it pointed out that in such an arrangement radiation will take place in the direction of the axis or bisector of the angle of the diverging wires, and that "the spacing at the open end [of the wires], while variable over a great range, should be in the neighborhood of a fifth of the length, and the length of each antenna section should be of the order of magnitude of five to ten waves long."

While such an arrangement projects the radio waves principally in two directions along the bisector of the angle of the antenna wires, the prior art had made use of an arrangement of wires, parallel to the wires of the angu-

lar antenna, as a "reflector" by which the radiation was projected as a beam in one direction away from the reflector and along the bisector of the angle of the wires.

The present Carter patent is for an "antenna system utilizing standing wave phenomena." Like the second Lindenblad patent, it is concerned with a V antenna by which the principal radiation is directed in the plane of the wires along the bisector of their angle. The disclosure of the patent, in which the court below found invention, was that the best directional radio propagation by the V type antenna is obtained with a structure in which the angle of the wires, their length, and the length of wave propagated are in a definite mathematical relationship expressed by a formula disclosed in the specifications.

In explaining his invention, Carter pointed out that "It is known that when a wire having a length greater than the operating wave length is excited in such manner that standing waves are produced thereon, radiation will occur principally in the direction of symmetrical cones having their apices at the center of the wire. Such is the case with a wire having a length equal to a plurality of one-half wave lengths at the operating frequency. The radiation pattern produced in such instance appears, in cross section, in the form of symmetrical cones about the wire. The present invention, which makes use of these phenomena, in its most simple aspect employs a pair of open-ended wires energized in phase opposition to have standing waves throughout the length of the wires, the wires having such angular relation with respect to each other as to obtain a highly directional, efficient and simple antenna system." [1]

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[1] Understanding of the disclosure and other features of the patent requires a brief explanation of its terms. The term "long," as applied to an antenna, means a wire which is long in relation to the

The patent states the mathematical formula by which the desired relationship is secured, which shows that the appropriate angle between each of the antenna wires and their bisector depends upon the wave length to be propagated and the use of antenna wires of a length which is a multiple of half wave lengths.[2]

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wave length used. The term "standing waves," as distinguished from "traveling waves," describes the phenomenon manifested when an oscillating electric current of radio frequency is communicated to one end of a wire which is open at the other (that is, not in a closed circuit) and sufficiently short so that the waves have not completely radiated their energy before reaching the end of the wire. The waves will then be reflected back along the wire, and the energy of the reflected waves tends to unite with that of the oncoming waves of the same periodicity, so as to produce standing waves along the wire. As the velocity of the radio wave in space is approximately that of the current waves in the wire, the number of complete standing waves on the wire is always exactly the same as the length of the wire divided by the wave length. When the length of the wire is a multiple of half wave lengths, the oncoming and reflected waves, traveling at the same velocity, occur simultaneously, differing in this respect from the waves in a wire of a length intermediate a multiple of half wave lengths, and with different effects upon the resulting radio energy, presently to be noted.

When oscillating current is so related to the length of wire that the energy of the former is exhausted by radiation before or when the waves reach the end of the wire, there is no reflection of the waves, and they travel in one direction only toward the open end of the wire. They are denominated "traveling waves." In professional parlance, wires producing reflected, and hence "standing" waves, are electrically of finite length. Those of sufficient length to avoid reflection and thus carry waves flowing in only one direction are said to be electrically of infinite length.

[2] The specifications state: "By considering a long wire the equivalent of a very large number of very short, (Hertz) oscillators and by adding up the field components at any point P having a direction angle θ relative to the axis of the wire, where the point P is a great distance from the wire as compared to the length of the wire such that all lines from point P to any point on the wire are essentially parallel, it can be shown that the field strength H is given by the

The significance of the formula lies in the fact that the angle between the wire and the direction of greatest radio activity is a trigonometrical function of two variables, the wave length used and the "number of half wave lengths contained in the wire," and that, as the application stated, the use of the formula in practice presupposes the use of a wire whose length is a multiple of half wave lengths. The patent then explains that the angle θ of the formula is the angle between each wire of the V antenna and its bisector—in other words, that the angle of the wires of the antenna is twice θ and hence, like the angle of the formula, is a function of the wave length and the length of the wires, which are each a multiple of half wave lengths long.

Carter did not invent the formula. It had been developed by Abraham and published in a scientific journal thirty years before. Annalen der Physik, 1898, Physikalische Zeitschrift, March 2, 1901. Abraham's formula expressed the scientific truth that when radio activity is projected from a charged wire of finite length, i. e., one having standing waves, and having a length of a multiple of half wave lengths, the angle between the direction of the principal radio activity and the wire is dependent on

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following proportionality for a conductor an odd number of half wave lengths long:

$$H\alpha \frac{\cos\left(n\frac{\pi}{2}\cos\theta\right)}{\sin\theta}$$

"The letter '*n*' indicates the number of half wave lengths contained in the wire.

"For a wire an even number of half wave lengths long, in similar fashion, the field strength 'H' is given by the following proportionality:

$$H\alpha \frac{\sin\left(n\frac{\pi}{2}\cos\theta\right)}{\sin\theta}$$

"Where n as above indicates the number of half wave lengths on the wire."

wave length and wire length, which is a multiple of half wave lengths. Lindenblad had described his antenna as using either standing or traveling waves and, as we have seen, had taught that with an arrangement of antenna wires at an angle, radiation will occur substantially in the direction of the bisector of the angle and that the preferred angle was dependent upon an indicated relationship between wire length and wave length.

It is plain, therefore, that the Carter invention, if it was invention, consisted in taking the angle of the Abraham formula as the angle between each wire of the V antenna and its bisector. By so doing he brought the cones of principal radio activity, each having one of the wires of the antenna as its axis, into conjunction at their periphery and along the bisector of the angle between the wires, and thus established there the greatest directional radio activity.

While a scientific truth, or the mathematical expression of it, is not patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be. But we do not stop to solve the problem whether it was more than the skill of the art to combine the teaching of Abraham with that of Lindenblad and others who had pointed out that the arrangement of the wires at an angle enhanced directional radio activity along their bisector. We assume, without deciding the point, that this advance was invention even though it was achieved by the logical application of a known scientific law to a familiar type of antenna. But it is apparent that if this assumption is correct the invention was a narrow one, consisting of a structure conforming to the teachings of the Abraham formula as to angle and wire length relative to wave length, and is to be strictly construed with regard both to prior art and to alleged infringing devices. *Kokomo Fence Machine Co.* v. *Kit-*

selman, 189 U. S. 8; *Cimiotti Unhairing Co.* v. *American Fur Refining Co.,* 198 U. S. 399. Carter's structure was a V antenna having an angle double the Abraham angle and wires containing a multiple of half wave lengths.

Carter, using the Abraham formula, calculated the value of the angle θ in that formula for wires up to fourteen wave lengths long. He plotted the result, which he expressed graphically in figure 12 of the patent by drawing a smooth curve connecting the discrete points on the graph which indicated the results of his computation by use of the Abraham formula. From this calculation he derived a formula in empirical form [3] for determining the desired angle when wave length and length of wire are known, in which the angle between the wires is described as twice α, which is the equivalent of the angle θ of the Abraham formula.

Petitioner uses antennae with wires in V arrangement, but their wires are not an integral number of half wave lengths long, with the exception of one antenna, No. 8, which is four wave lengths long and uses an angle 10% smaller than that prescribed by the Abraham formula for that length of wire. The others are of lengths which are approximately multiples of quarter wave lengths, and their angles differ from the angles of the formula. The crucial question in the case is whether a V antenna structure, having a wire length to which the Abraham formula does not apply and using an angle not to be derived from that formula, which is the basis of the patent, infringes Carter's patent. Respondent insists that it does, because, as it argues, the invention disclosed by Carter's

[3] "For practical purposes the empirical formula

$$\alpha = 50.9\left(\frac{l}{\lambda}\right)^{-0.513} \text{ degrees}$$

is sufficiently accurate where l equals the length of the wire and λ the wave length, both in the same units of measurement."

application, elaborated by amendment and broad claims, embraces all V antennae arranged at an angle double the angle of the empirical formula, even though the length of the wires is not an exact multiple of half wave lengths, as prescribed by the Abraham formula. This is the invention of Claim 15,[4] and it is urged that the claim is amply supported by the statement in the specifications appearing in the original application that the empirical formula represented by the plotted curve of figure 12 of the patent "will be found accurate for all practical purposes where the length of wire dealt with does not correspond to a whole number of half wave lengths."

The trial court, analyzing Carter's application and taking into account the essentials of the Abraham formula and the statement in the application that the "object of the present invention is to disclose the proper angle for conductors or radiators" measured in multiples of half wave lengths, evidently thought, as petitioner argues, that the references in the application to "wires of finite" [5]

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[4] "15. An antenna comprising a pair of relatively long conductors disposed with respect to each other at an angle substantially equal to twice

$$50.9\left(\frac{l}{\lambda}\right)^{-0.513}$$

degrees, l being the length of the wire and λ the operating wave length in like units, and means in circuit with said antenna for exciting the conductors in phase opposition whereby standing waves of opposite instantaneous polarity are formed on the conductors throughout their length."

Claim 16 claims an antenna arranged in conformity to the empirical formula, as in Claim 15, with "a similar parallel pair of conductors spaced an odd number of quarter wave lengths away from said first mentioned pair . . ." These parallel wires constitute the "reflector," which, as already noted, was old in the art.

[5] "Still a further object of the present invention is to disclose the proper angle for conductors or radiators either an even number of half wave lengths long or an odd number of half wave lengths long,

length and to wires "of any length whatsoever" [6] were intended only to refer to wires of electrically finite as distinguished from electrically infinite length, capable of producing standing waves utilized by the antenna of the patent, and of any length conforming to the requirements of the basic formula.[7] It concluded that the correct construction of the application was that the invention described did not go beyond the scope of the Abraham formula and so extended only to the angles calculable by that formula for standing wave wires measured by multiples of half wave lengths. Support is given to this conclusion by the statement in the application that "The law, giving the correct angle for lengths between odd and even number of half wave lengths, is not given due to its complexity . . ."

The Court of Appeals placed emphasis on the reference to "wires of any finite length" and on the statement that

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and, in general to disclose the angle for best directional propagation for wires of any finite length."

After the present suit was brought this paragraph was amended to read:

"Another object of the invention is to disclose the angle for the best directional propagation for open-ended wires of any finite length, preferably longer than the operating wave length, having standing waves thereon and arranged in the manner proposed."

[6] "Moreover, it should be clearly understood that the wires of each unit can be of any length whatsoever provided they are placed at the correct angle for their length. For best tuning, the total overall length of both of the wires and the 'U' loop terminating them should be effectively an integral number of half wave lengths, but, the portion forming the radiation element can be of any length. The law, giving the correct angle for lengths between odd and even number of half wave lengths, is not given due to its complexity, but the empirical formula and the curve of figure 12 will be found accurate for all practical purposes, where the length of wire dealt with does not correspond to a whole number of half wave lengths."

[7] See note 1, *supra.*

"the empirical formula and the curve of figure 12 will be found accurate for all practical purposes, where the length of wire dealt with does not correspond to a whole number of half wave lengths." It held that the invention disclosed was the application of the empirical formula to all lengths of antenna wires and embraced all angles resulting from such calculation, and that the invention was consequently infringed by petitioner's structures.

Whether or not it was the purpose of the patentee, by these references to wire lengths in his application, to extend his patent to structures not conforming to the Abraham formula, we are not able to construe the application, before amendment at least, as embracing such an extension. And we think that the attempt to extend the claims, based on the application of the empirical formula, to wire lengths not multiples of half wave lengths, must fail, because such structures are not within the invention described in the application.

The formula in Claims 15 and 16 is the empirical formula derived from the Abraham formula, which is, by its terms, applicable only to antenna wires which are multiples of half wave lengths long. Carter's empirical formula, wholly derived from Abraham's formula, and taken together with it, therefore discloses no invention or discovery more than the application of the Abraham formula to the V antenna. It reveals no scientific law applicable to wire lengths which are intermediate of multiples of half wave lengths, and the application explicitly states that "the law, giving the correct angle for lengths between odd and even number of half wave lengths, is not given." The preparation, by methods familiar to engineers, of the graph in figure 12, which was but a pictorial representation of the Abraham formula applied to certain wire lengths specified in the formula, did not involve invention. Neither the empirical formula nor its graph gives any clue to the directional radio activity re-

sulting from the use of wire lengths intermediate of multiples of half wave lengths, which were excluded by the Abraham formula, and neither afforded any basis for a claim of invention not supported by the use of the Abraham formula itself.

The claimed use of the empirical formula for the calculation of the angle for wires which are not multiples of half wave lengths long thus involved a departure from what Carter's application had described as his invention, and a contradiction of it. What Carter did was to describe his structure in terms of its dimensions, arrived at by the use of the Abraham formula, which was stated to embody the applicable scientific law. He then derived the empirical formula from Abraham. From the very method of derivation the empirical formula meant nothing different from that of Abraham. He then declared the empirical formula to embody a method of arriving at the measurements of a structure different from the structure first described as the invention and not capable of construction by the method of the Abraham formula. If, as a result of this legerdemain, a V antenna having wire lengths a multiple of any fractional wave length is to be taken as the invention of Carter's application, then everything that it said of the Abraham formula and of wires "either an even number of half wave lengths long or an odd number of half wave lengths long" could be discarded without changing its meaning.[8]

This attempt to broaden the only invention described in the application through a purely mechanical alteration of the meaning of the empirical formula, which had been devised as a shorthand expression of the scientific law on which the invention was declared to rest, cannot, we think, be taken to enlarge the description of the invention as measured by the Abraham formula, so as to include a structure to which that formula does not apply.

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[8] See note 5, *supra.*

This use of the empirical formula for a purpose for which it was not devised does not justify our construing the application as though all reference to the Abraham formula had been eliminated and a new and different one expressing a new and different scientific law had been substituted for it. The result of reading the application as respondent contends it should be construed is precisely the same as though full effect were given to a claim which goes beyond the invention described, and it is open to the same objection.

After the present suit was brought the application was altered by amendment so as in effect to wipe out all reference to the scientific law by which Carter's invention was defined. This was accomplished by changes which implicitly assert that the letter n of the formula of the invention, the Abraham formula, meant something different from "the number of half wave lengths contained in the wire" of a length of multiples of half wave lengths as stated both in the application and in the patent.

The reference in the application to the purpose of the invention to disclose the "proper angle" for radiators of multiples of half wave lengths long was altered by eliminating from it all mention of half wave lengths.[9] A sentence added after formal allowance of the patent states: "By the term 'plurality of wave lengths', or 'plurality of half wave lengths', or 'several half wave lengths', it is not intended that the wires so described shall necessarily be an exact or appropriate integral number of such lengths, unless so specified, but rather that each of the wires so described shall be sufficiently long to include the lengths specified." These amendments operated to modify the Abraham formula so as to cancel from the application the statement of the scientific law defining the invention. They left as its definition the modified

[9] See note 5, *supra*.

Abraham formula and its counterpart, the empirical formula, stating a different law which their genesis did not authorize.

We think that these alterations were not permissible. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, and that without them the invention must be taken to be limited to a structure having an angle double that disclosed by the Abraham formula, which was made the basis of the alleged invention. As already shown, neither the Abraham formula nor the empirical formula describes, or purports to describe, the directional radio activity or defines the angle which affords "the best directional propagation" of the patent for antennae of wire lengths intermediate of multiples of half wave lengths. The expert testimony shows that in fact neither formula serves that purpose. The finding of the trial court that they do not make "a correct showing of what happens when the wires are other than exact multiples of half wave lengths" is supported by the evidence. The testimony warrants the conclusion that differences in wave effect already noted,[10] when wires of other than exact multiples of half wave lengths are used, produce, through consequent changes in "radiation resistance," differences in directional radio activity not calculable by the formulae of the patent. It follows that Claims 15 and 16, so far as they claim antennae of wire lengths intermediate of multiples of half wave lengths, are invalid. So far as the patent discloses and claims invention of a structure made in conformity to the Abraham formula, petitioner's structures do not infringe, for none of them conforms to the Abraham formula.

For reasons already indicated it is not material that the variations are small between the angles used by petitioner for wire lengths of multiples of quarter wave lengths

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[10] See note 1, *supra*.

and those obtained by application of the empirical formula. Further, Carter's advance over prior art was in specifying an exact angle for wires of the prescribed length. Lindenblad had indicated a preferred angle, and Bruce, before Carter, had plotted a rule of thumb graph, which the trial court found to be prior art, showing the directional radio activity of a V antenna and exhibiting relatively small variations from that of Carter. Carter, avoiding prior art by defining his angle for antennae with wires of particular wave lengths with mathematical precision, cannot discard that precision to establish infringement. *Kokomo Fence Machine Co.* v. *Kitselman, supra; Cimiotti Unhairing Co.* v. *American Fur Refining Co., supra,* cf. *General Electric Co.* v. *Wabash Corp.,* 304 U. S. 364.

It is unnecessary to discuss the further question whether petitioner's structures avoid infringement because the direction of their principal radio activity is not in the plane of the wires, an operative difference from the antennae described by the patent which the court below found to be due wholly to ground effect, which it thought must be assumed to be envisaged by, though not stated in, the Carter patent.

Reversed.

Mr. Justice Roberts took no part in the consideration or decision of this case.

WICHITA ROYALTY CO. ET AL. *v.* CITY NATIONAL BANK OF WICHITA FALLS ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 314. Argued January 6, 1939.—Decided January 30, 1939.

1. The opinion of the Supreme Court of Texas at an earlier stage of this case, defining the liability of a bank for trust-funds transferred by a trustee from the trust account to a personal account, and checked out and misappropriated by him after the bank had accepted payment of his personal debts to the bank or an officer thereof, with notice that the payments had their source in trust funds, was not modified by the opinion of that court in *Quanah, Acme & Pacific Ry. Co.* v. *Wichita State Bank & Trust Co.*, 127 Tex. 407. P. 108.

   The earlier opinion must be accepted as stating the law of Texas, and it affords the appropriate guide for the federal court so far as it may be applicable to the facts which have been developed on the trial there.
2. Decision on first appeal is not *res judicata* in subsequent hearing of the case. P. 107.
3. Upon removal of a case for retrial after an appeal to and reversal by a state supreme court, it is the duty of the federal court to determine and apply the state law to local questions as the state court would have done, and, where the state court holds itself free to modify or recede from its own opinions, the federal court is free to examine later opinions of the state court in order to ascertain the applicable state law. P. 107.
4. The Circuit Court of Appeals properly directed remand of this case to the District Court for findings of fact and conclusions of law in accordance with Equity Rule 70½. P. 110.

95 F. 2d 671; 97 *id.* 249, affirmed.

CERTIORARI, 305 U. S. 587, to review the reversal of a decree in a case removed from a state court. The District Court had denied recovery on certain claims and counterclaims which were involved in the original suit. This Court affirms the judgment of the court below in remanding the case for findings of fact and conclusions of

law, but differs from that court in respect of principles applicable in disposition of the case.

Messrs. Ray Bland and *Guy Rogers,* with whom *Mr. J. T. Montgomery* was on the brief, for petitioners.

Messrs. Leslie Humphrey and *T. R. Boone* for respondents.

Mr. Justice Stone delivered the opinion of the Court.

We are asked to determine whether the Circuit Court of Appeals correctly applied the law of Texas in a suit upon a cause of action arising in that state between a Texas association acting under a declaration of trust and a national bank doing business there.

The proceedings in the present litigation have been extensive and complex but only those relevant to the issue presented here need be detailed. Respondent, the City National Bank of Wichita Falls, brought suit in a Texas court against the association, petitioner here, and its trustee to recover on two promissory notes, one made and the other endorsed by petitioner. They filed a cross-action against the bank, impleading its vice-president, to recover a deposit balance in favor of petitioner on the ground that the bank had improperly charged the account with drafts drawn upon it by Peckham, a former trustee of petitioner, or at his direction, and that Peckham, in breach of trust, had used the proceeds in part to pay his own debts to the bank or its vice-president, and in part for other expenditures for his own benefit.

The misappropriations were alleged to have been effected by the withdrawal of funds from the deposit account by a large number of checks signed by Peckham as trustee, or at his direction, and payable to his own order or to the bank. Some were alleged to have been credited by the bank in payment of the trustee's personal debts and some to his personal account with the bank, from

which he later withdrew a substantial part of the amounts so deposited and used it for his own purposes. Petitioner contended that some of the funds thus withdrawn from his personal account were used in payment of his personal debts to the bank or its vice-president and that the bank and its vice-president, because of the transactions with the bank and the form of the checks, had notice of and had participated in the breaches of trust or some of them and to that extent were liable for all the misappropriations.

The trial court directed a verdict and entered judgment in favor of the bank on the notes and against petitioner on its cross-action. On appeal the Supreme Court of Texas reversed and remanded the cause for a new trial upon such further evidence as might be adduced, and in its opinion stated the applicable principles of law for the guidance of the trial court. 127 Tex. 158, 184. Meanwhile, the bank had closed its doors. Its assets were taken over by respondent, the newly organized City National Bank in Wichita Falls, which assumed the liabilities of the old bank.

On the remand the directors and the liquidating agent of the old bank and the new bank were made parties defendant to the cross-action by petitioner association, and the pleadings were amended so as to charge the new individual defendants with responsibility for the liability originally asserted against the old bank, and also to charge the new bank by reason of its acquisition of the assets and its assumption of the liabilities of the old one.

The cause was then removed to the federal District Court for northern Texas, under § 28 of the Judicial Code, 28 U. S. C. § 71. On the trial of the cause there, in the course of which voluminous evidence was taken before a commissioner, the District Court denied recovery to the old bank on the promissory notes and to the association upon its claim against the old bank and the various other

parties sought to be charged with its liability, but directed that jurisdiction be retained to wind up the affairs of the insolvent bank. § 24 (16) of the Judicial Code, 28 U. S. C. § 41 (16); *International Trust Co.* v. *Weeks,* 203 U. S. 364.

The Court of Appeals for the Fifth Circuit set aside the decree because of the failure of the trial court to make findings of fact and state conclusions of law as required by Equity Rule 70½. 95 F. 2d 671. In remanding the cause the court stated, for the guidance of the trial court, principles of law which it thought applicable to the cause of action asserted by the association. These were at variance with those which the Texas Supreme Court in its earlier remand of the case had declared to be controlling. It rejected in part the rulings of the state court because it thought that the questions presented were of general commercial law, with respect to which the federal courts were not bound by local decisions, and that the rules which the Texas courts had adopted were not favored by the decisions of the federal and some state courts.

In its opinion denying a second petition for rehearing, 97 F. 2d 249, presented after our decision in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the court disclaimed any purpose not to follow the law of Texas, but reaffirmed its instructions for the trial court on the ground that they were in harmony with the opinion of the Supreme Court of Texas in a later case, *Quanah, Acme & Pacific Ry. Co.* v. *Wichita State Bank & Trust Co.,* 127 Tex. 407; 93 S. W. 2d 701, which the Court of Appeals thought had modified and restricted the rules announced by the state court on the appeal in this case. We granted certiorari, 305 U. S. 587, on a petition urging that it was the duty of the Court of Appeals to apply the law as defined by the Supreme Court of Texas on the first ap-

peal, the question, concerning the relations of the federal and state courts, being of public importance.

In departing from the "law of the case," as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court. *Erie Railroad Co.* v. *Tompkins, supra.* But the case on the first appeal had not become *res judicata. Remington* v. *Central Pacific R. Co.,* 198 U. S. 95, 99, 100; *Messenger* v. *Anderson,* 225 U. S. 436, 444; *Diaz* v. *Patterson,* 263 U. S. 399, 402; *Seagraves* v. *Wallace,* 69 F. 2d 163, 164, 165. And since the Supreme Court of Texas holds itself free upon reconsideration to modify or recede from its own opinions, see *Quanah, Acme & Pacific Ry. Co.* v. *Wichita State Bank & Trust Co., supra,* superseding 89 S. W. 2d 385, the court below, in applying the local law, was likewise free to depart from the earlier rulings to the extent that examination of the later opinions of the Texas Supreme Court showed that it had modified its opinion on the first appeal. Hence the only question for our decision is whether the Court of Appeals rightly concluded that the state court had thus altered its opinion.

The Court of Appeals held, as did the Texas Supreme Court, that the old bank, so far as it had accepted payment of the trustee's personal debts from his personal account, with notice that the payments had their source in trust funds, had become liable for the trustee's misappropriations by reason of its participation in them. But the two courts differed with respect to the liability of the bank for trust funds commingled with the trustee's per-

sonal account and later withdrawn and used for his personal benefit. The state court had ruled that the bank was responsible for all such misappropriations as took place after it had knowingly accepted trust funds in payment of the trustee's personal debts. Pointing out that there was evidence of such transactions, it declared, 127 Tex. 158, 174, 175: "the Bank, after being charged with knowledge of Peckham's dishonest dealings, continued to credit Peckham's personal account with checks drawn on the Trust account, and persisted in its course of dealings with respect to the two accounts. Having incurred the burden of ascertaining whether subsequent expenditures made by the Trustee from the commingled funds were for authorized Trust purposes, it cannot effectively complain of the weight of that burden." And it concluded, 127 Tex. 158, 182: "It is apparent from what has been stated that the amount of the Bank's liability is the difference between the total amount of the deposits [of trust moneys] for which Peckham's personal account received credit after he began commingling Trust funds with his own on October 8, 1925, and the total amount of withdrawals therefrom which the Bank may show were used for authorized Trust purposes." [1]

The court below, relying on the decision of the Texas Supreme Court in the later *Quanah* case, declined to accept this conclusion. Instead it declared that the bank was not chargeable with notice of the trustee's misappropriations through withdrawal and use of trust funds deposited in his personal account by the bare fact of its knowledge that the trustee had previously paid his per-

[1] The opinion assumed that all the funds in the personal account on October 8, 1925, were trust funds and that on November 17, 1925, the trustee paid his personal indebtedness to the bank from those funds. 127 Tex. 158, 168. In its opinion on the motion for rehearing the court stated that these assumptions were not to be taken as foreclosing proof of the facts upon the new trial. 127 Tex. 158, 184.

sonal debts to the bank with trust funds passed through his personal account. But the *Quanah* case presented a different question from that considered by the Texas court in the present case. The former involved no question of actual knowledge and participation by the bank in the misappropriation of trust funds. There an officer of a corporation deposited its funds in his personal account in a bank with which the corporation had no account. The bank had knowledge that the funds or some of them belonged to the corporation and not to the officer personally, but it paid them out on the order of the officer, who appropriated them to his own use. In holding that the bank was not liable, the court adopted the rule, for which it found support in the decisions of other courts and in text writers, that the bank in such circumstances is not liable for the misappropriation. The court was at pains to point out that a different rule would have been applicable if, before the withdrawals from the account, "the bank [had] actively participated in the spoliation of the trust fund and knowingly received a part of the fund to itself in payment of the trustee's individual debt to it," citing its opinion in the present case. 127 Tex. 407, 421, 422.

Even if we thought this distinction not well taken, nothing requires the state courts to adopt the rule which the federal or other courts may believe to be the better one, or to be consistent in their decisions if they do not choose to be. That the distinction taken in the *Quanah* case was advisedly made and was not intended to modify the rule announced by the state court on the appeal in this case, appears from the opinions in both cases. On the same day that the final opinion in the *Quanah* case, from which we have quoted, was delivered by the Texas Supreme Court, it denied a petition for rehearing in the present case, with an opinion, 127 Tex. 184, which left undisturbed the principles announced in the first decision.

In its final opinion in the *Quanah* case it said: ". . . we have again carefully reviewed the opinion in the *Wichita Royalty Co. et al.* v. *City National Bank of Wichita Falls* case, . . . decided by this court on the same day the case at bar was originally decided. . . . We are satisfied with our opinion in the *Wichita Royalty Company* case as explained by our opinion on rehearing in that case." 127 Tex. 407, 421, 422. As there is no contention that the opinion of the Texas court in this case has in any other respect been modified by the *Quanah* or any other case in the Texas Supreme Court, we do not discuss other parts of the opinion below which it is argued fail to follow the opinion of the state court.

We think that the opinion of the Supreme Court of Texas in the present case has not been modified by the *Quanah* case and must be accepted as stating the law of Texas; and that it affords the appropriate guide for the District Court so far as it may be applicable to the facts which have been developed on the trial there. As the court below properly directed the remand for a statement of findings and conclusions of law under the equity rule, the decree will be affirmed but the proceedings in the District Court will be in conformity to this opinion.

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* R. J. REYNOLDS TOBACCO CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 328. Argued January 6, 1939.—Decided January 30, 1939.

1. Section 22 (a) of the Revenue Act of 1928, defining gross income, was so general in its terms that an interpretative administrative regulation determining whether it included gain from the resale by a corporation of its own stock was appropriate. P. 114.
2. Article 66 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, specifically provided that for the purpose

of the income tax no gain or loss is realized by a corporation from the purchase or sale of its own stock. This administrative construction of sections of the revenue acts defining gross income had been uniform since at least 1920. May 2, 1934, before the 1929 tax of the corporate taxpayer herein had been finally determined, the Treasury adopted an amendment to Article 66 subjecting to tax any gain derived by a corporation from the sale of its own shares where it "deals in its own shares as it might in the shares of another corporation." *Held:*

(1) The ascertainment of gain by the corporation for the taxable year 1929 is to be determined in conformity to the regulation then in force and not by the amendment. P. 115.

(2) The regulation in force in the taxable year 1929 must be taken to have been approved and to have been given the force of law by Congress. P. 115.

(3) Section 605 of the 1928 Act did not authorize the Treasury to repeal the rule of law that existed during the period for which the tax was imposed. P. 116.

(4) The reënactment of § 22 (a) in the Revenue Acts of 1936 and 1938, without more, may not be taken as sanction by Congress of a retroactive application of the amended regulation. P. 117.

97 F. 2d 302, affirmed.

CERTIORARI, 305 U. S. 587, to review the reversal of a decision of the Board of Tax Appeals, 35 B. T. A. 949, which sustained the Commissioner's determination of a deficiency in income tax.

Mr. Paul A. Freund, with whom *Solicitor General Jackson, Assistant Attorney General Morris*, and *Messrs. J. Louis Monarch* and *Morton K. Rothschild* were on the brief, for petitioner.

Mr. J. G. Körner, Jr. for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The sole question for decision is whether gain accruing to a corporation consequent on the purchase and re-

sale of its own shares constitutes gross income within the meaning of § 22 (a) of the Revenue Act of 1928.[1]

The respondent, a New Jersey corporation, on occasion between 1921 and 1929, purchased its own Class B common stock for reasons of policy, such as the elimination of a very large single holding, the broadening of the ownership of the stock, and the support of the market to protect the investments of employe shareholders. This stock was resold from time to time. While held it was treated as treasury stock and the cost of it was entered in the accounts as "Investments in Non-competitive Companies." The books showed no increase or reduction of capital stock on account of purchases or sales. During 1929 the company sold shares acquired in that and prior years for a sum which exceeded cost by $286,581.21, which amount was entered in the books as a cash item and added to surplus. In its income tax return for 1929 the company listed this gain under the caption "Other Items of Non-Taxable Income," as "Profit R. J. R. Stock."

The Commissioner determined a deficiency in the tax paid for 1929 involving items not here in controversy and the company appealed to the Board of Tax Appeals where those items were adjusted. Before the case was closed the Commissioner by amended answer alleged that the taxpayer's net income should be increased by the amount of the "net profit realized . . . through trafficking in Class B common stock of the . . . Company," and claimed a resulting deficiency. He based his claim upon Treasury Regulation 74, Article 66, as amended by a Treasury decision of May 2, 1934,[2] which states "where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss

[1] c. 852, 45 Stat. 791.

[2] Treasury decision 4430, XIII–1 Cumulative Bulletin 36.

is to be computed in the same manner as though the corporation were dealing in the shares of another."

The Board, after finding the facts in detail, sustained the Commissioner.[3] The Circuit Court of Appeals reversed the Board's ruling.[4] Because of asserted conflict we granted the writ of certiorari.[5]

Section 22 (a) is: "General definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." Section 62 directs the Commissioner, "with the approval of the Secretary" of the Treasury, to "prescribe and publish all needful rules and regulations for the enforcement of this title." Article 66 of Treasury Regulations 74, promulgated under the Act of 1928, so far as material, is: "If . . . the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A corporation realizes no gain or loss from the purchase or sale of its own stock."

Petitioner contends that, as Congress must be taken to have exercised its constitutional power to the fullest extent in laying the tax, § 22 (a) should be held to include the gain realized from sales of a corporation's own

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[3] 35 B. T. A. 949.

[4] *R. J. Reynolds Tobacco Co.* v. *Commissioner*, 97 F. 2d 302.

[5] See *First Chrold Corp.* v. *Commissioner*, *post*, p. 117.

stock, and the quoted regulation cannot restrict the scope of the statutory definition. The respondent replies that such gain is capital gain and not income, as is demonstrated by the theory and practice of accounting [6] and by court decisions.[7] The court below found it unnecessary to decide this issue, holding that whether the increment is income is at least a debatable question and the regulation was, therefore, proper as an interpretation of the meaning of the section. We agree that § 22 (a) is so general in its terms as to render an interpretative regulation appropriate.[8]

The administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the revenue acts from that of 1913 to that of 1932, as evidenced by Treasury rulings and regulations, and decisions of the Board of Tax Appeals.[9] In the

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[6] See e. g. Dickinson, "Accounting Practice and Procedure," 130, 132; Sunley and Pinkerton, "Corporation Accounting," 121; Streightoff, "Advanced Accounting," 134–5.

[7] *Johnson* v. *Commissioner*, 56 F. 2d 58; *Squibb & Sons* v. *Helvering*, 98 F. 2d 69; compare, *Borg* v. *International Silver Co.*, 11 F. 2d 143, 147; *Commissioner* v. *Inland Finance Co.*, 63 F. 2d 886; *Carter Hotel Co.* v. *Commissioner*, 67 F. 2d 642.

[8] *Morrissey* v. *Commissioner*, 296 U. S. 344, 354.

[9] See L. O. 1035, 2 C. B. 132, 3 C. B. 160; L. O. 296, 5 C. B. 210; L. O. 426, 5 C. B. 210; A. A. R. 693, 5 C. B. 207; I. T. 1198, C. B. I–1, 275; A. A. R. 799, C. B. I–1, 374; I. T. 1802, C. B. II–2, 267. Reg. 45, Arts. 542 and 563; Reg. 62, Arts. 543 and 563; Reg. 65, Arts. 543 and 563; Reg. 69, Arts. 543 and 563; Reg. 74, Arts. 66 and 176; Reg. 77, Arts. 66 and 176. Simmons & Hammond Mfg. Co., 1 B. T. A. 803; Cooperative Furniture Co., 2 B. T. A. 165; Atlantic Carton Corp., 2 B. T. A. 380; Hutchins Lumber & Storage Co., 4 B. T. A. 705; Farmers Deposit Nat. Bank, 5 B. T. A. 520; H. S. Crocker Co., 5 B. T. A. 537, 541; Interurban Construction Co., 5 B. T. A. 529; Liberty Agency Co., 5 B. T. A. 778; Union Trust Co., 12 B. T. A. 688, 690; 105 West 55th Street, Inc., 15 B. T. A. 210, 213; American Cigar Co., 21 B. T. A. 464, 495; Carter Hotel Co., 25 B. T. A. 933.

meantime successive revenue acts have reënacted, without alteration, the definition of gross income as it stood in the Acts of 1913, 1916, and 1918.[10] Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.

The petitioner concedes that if nothing further appeared he would be bound to apply the statute in conformity to the regulation. He asserts, however, that the amendment adopted by the Treasury May 2, 1934, while this cause was pending before the Board, is controlling. By the amendment Article 66 is made to read: "Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. . . .

"But where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. . . . Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of applicable statutes."

Petitioner urges that the amendment operates retroactively and governs the ascertainment of gross income for taxable periods prior to the date of its promulgation, and, further, since Congress has reënacted § 22 (a) in the Revenue Acts of 1936 and 1938, it has approved the regu-

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[10] See R. A. 1913, § II, B, 38 Stat. 167; R. A. 1916, § 2 (a), 39 Stat. 757; R. A. 1918, § 213 (a), 40 Stat. 1065; R. A. 1921, § 213 (a), 42 Stat. 238; R. A. 1924, § 213 (a), 43 Stat. 267; R. A. 1926, § 213 (a), 44 Stat. 23; R. A. 1928, § 22 (a), 45 Stat. 797; R. A. 1932, § 22 (a), 47 Stat. 178.

lation as amended. We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force.

Section 605 of the Revenue Act of 1928 provides that "In case a regulation or Treasury decision relating to the internal-revenue laws is amended by a subsequent regulation or Treasury decision made by the Secretary or by the Commissioner with the approval of the Secretary, such subsequent regulation or Treasury decision may, with the approval of the Secretary, be applied without retroactive effect." [11] It is clear from this provision that Congress intended to give to the Treasury power to correct misinterpretations, inaccuracies, or omissions in the regulations and thereby to affect cases in which the taxpayer's liability had not been finally determined, unless, in the judgment of the Treasury, some good reason required that such alterations operate only prospectively. The question is whether the granted power may be exercised in an instance where, by repeated reënactment of the statute, Congress has given its sanction to the existing regulation.

Since the legislative approval of existing regulations by reënactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed. We need not now determine whether, as has been suggested,[12] the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reënactment of the statutory provision unaltered after a change in the ap-

[11] 45 Stat. 874. Somewhat similar provisions were contained in earlier acts. See Revenue Act of 1921, § 1314, 42 Stat. 314; Revenue Act of 1926, § 1108 (a), 44 Stat. 114.

[12] *Squibb & Sons* v. *Helvering*, 98 F. 2d 69, 70.

plicable regulation. As the petitioner points out, Congress has, in the Revenue Acts of 1936 and 1938, retained § 22 (a) of the 1928 Act *in haec verba.* From this it is argued that Congress has approved the amended regulation. It may be that by the passage of the Revenue Act of 1936 the Treasury was authorized thereafter to apply the regulation in its amended form. But we have no occasion to decide this question since we are of opinion that the reënactment of the section, without more, does not amount to sanction of retroactive enforcement of the amendment, in the teeth of the former regulation which received Congressional approval, by the passage of successive Revenue Acts including that of 1928.

The judgment is

Affirmed.

FIRST CHROLD CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 385. Argued January 6, 1939.—Decided January 30, 1939.

Decided on the authority of *Helvering* v. *R. J. Reynolds Tobacco Co., ante,* p. 110.

97 F. 2d 22, reversed.

CERTIORARI, 305 U. S. 589, to review the affirmance of a decision of the Board of Tax Appeals sustaining a determination of deficiency in income tax.

Mr. John E. McClure, with whom *Mr. Robert N. Miller* was on the brief, for petitioner.

Solicitor General Jackson, Assistant Attorney General Morris, and *Messrs. Sewall Key, Paul A. Freund,* and *Morton K. Rothschild* submitted for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents the same question as that involved in No. 328, *Helvering* v. *R. J. Reynolds Tobacco Co., ante,* p. 110. Certiorari was granted because of a conflict in the decisions below. The statutory provision under which this case arises is § 22 (a) of the Revenue Act of 1932, which is the same as the corresponding section of the Revenue Act of 1928. The regulations, original and amended, have the same relation to this controversy as to that in No. 328. The Board of Tax Appeals sustained a determination of a deficiency in the petitioner's tax for the calendar year 1933 and the Circuit Court of Appeals affirmed the Board's ruling.[1]

For the reasons given in No. 328 the judgment must be

Reversed.

TENNESSEE ELECTRIC POWER CO. ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 27. Argued November 14, 15, 1938.—Decided January 30, 1939.

1. The principle permitting suit against an agent of the Government to restrain execution of an unconstitutional statute protects only legal rights. P. 137.
2. Franchises to be a corporation and to function as a public utility and non-exclusive franchises to occupy and use public property and places for service of the public, do not grant freedom from competition. P. 138.
3. The validity of a statutory grant of power can not be challenged merely because its exercise results in harmful competition. The damage is *damnum absque injuria.* P. 139.

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[1] 97 F. 2d 22.

4. State laws requiring electric power companies to obtain certificates of convenience and necessity as a condition to doing business do not confer upon those possessing such certificates a standing to enjoin operations of the Tennessee Valley Authority, which, though it has no such certificate, operates with consent of the State. P. 141.
5. The appellant power companies may not raise, in this case, any question of discrimination forbidden by the Fourteenth Amendment involved in state exemption of the Tennessee Valley Authority from commission regulation. *Frost* v. *Corporation Commission,* 278 U. S. 515, distinguished. P. 143.
6. The competition of the Tennessee Valley Authority in underselling the power companies and in fixing resale rates by contract, does not amount to regulation of their rates in violation of the Tenth Amendment, and gives rise to no cause of action under that Amendment or under the Ninth Amendment. P. 143.
7. The findings and evidence in this case do not sustain the charge of a conspiracy between the Tennessee Valley Authority and the Public Works Administrator to intimidate the appellant power companies into selling their existing systems where the Authority desires to seize the market for electricity. P. 144.

   Coöperation by two federal officials, one acting under a statute whereby funds are provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy to injure their business. P. 146.

21 F. Supp. 947, affirmed.

Appeal from a decree of a District Court of three judges which dismissed a bill filed by numerous electric power companies wherein they sought to enjoin the Tennessee Valley Authority and its three executive officers and directors, from generating, distributing and selling electric power and from other injurious and allegedly unconstitutional activities in harmful and destructive competition with the appellants.

Messrs. Raymond T. Jackson and *John C. Weadock,* with whom *Messrs. Charles C. Trabue* and *Charles M. Seymour* were on the brief, for appellants.

The water power is not being, and will not be, constitutionally created. The Federal Government will acquire no title to such water power.

The electricity will not result incidentally to an exercise of the implied power to improve navigation. Power development is an independent, if not the primary, purpose. This is plain on the face of the Act.

Considered as a whole, the appellees' Unified Plan is plainly a power project.

In any event the water power created by the tributary reservoirs is not incidental to the improvement of navigation.

Both the statutory scheme and the administrative plan are plainly attempts, in the guise of exercising the implied power to improve streams for navigation, to exercise power not granted but forbidden to the Federal Government. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Linder* v. *United States,* 268 U. S. 5; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 291; *Child Labor Tax Case,* 259 U. S. 20, 37.

The trial court did not recognize that the question is whether the water power is to be the incidental result of the operation of structures which have a real, substantial and *bona fide* relation to the improvement of navigation. Apparently, it deemed the controlling question to be whether power development would be "inconsistent" with or obstructive of navigation, and thought that under the euphonious title of a "multiple purpose project" the Government may yoke together constitutional and unconstitutional enterprises. Constitutional limitations may not be so evaded. *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362; *Employers' Liability Cases,* 207 U. S. 463, 501.

None of the commercial water power is created by the operation of any flood control structures included in the Unified Plan.

Flood control is minor, if not pretensive, and any attempt to sustain that plan as a flood control project fails as an attempt to accomplish a forbidden object under the pretense of exercising a constitutional power. *United States* v. *Constantine,* 296 U. S. 287, 289. It is plain on the face of the Act that power development is not incidental to flood control. The federal power over flood control does not extend beyond the protection of navigation channels and works. Cf. *Jackson* v. *United States,* 230 U. S. 1, 18, 23; *Cubbins* v. *Mississippi River Comm'n,* 241 U. S. 351; 204 F. 299; *Leovy* v. *United States,* 177 U. S. 621; *Manigault* v. *Springs,* 199 U. S. 473; *Orr* v. *Allen,* 248 U. S. 35; *St. Louis S. W. Ry. Co.* v. *Board of Directors,* 207 F. 338.

The electricity will not be produced as an incident of the exercise of the war or national defense power, and it has never been held that in time of peace the Federal Government may carry on all of the businesses which might be commandeered or which might produce articles essential or convenient in the prosecution of a war.

Neither the statutory nor the administrative method of disposing of the electricity is within the constitutional power of the Federal Government. Each violates the Fifth, Ninth and Tenth Amendments.

The power to dispose of federal property does not include any power of regulation, or the power to engage in the conduct or management of a business having no relation to the purposes for which the Federal Government was established. See *Kansas* v. *Colorado,* 206 U. S. 46, 89, 92; *South Carolina* v. *United States,* 199 U. S. 437, 457–459; *Van Brocklin* v. *Anderson,* 117 U. S. 151, 158; *Florida* v. *United States,* 282 U. S. 194, 211–212; *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493; *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *New York* v. *United States,* 257 U. S. 591; *Arkansas Railroad Comm'n v. Chicago, R. I.*

& P. R. Co., 274 U. S. 597; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 546–548; *United States* v. *Butler*, 297 U. S. 1.

It surely may not be used for the purpose, or with the direct and necessary effect, of governing concerns reserved to the States and the people or of upsetting the balance of our dual system.

The distribution and sale of electricity within the State is a local public service, subject to full and complete regulation by the State under its police powers. *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372, 374; *Munn* v. *Illinois*, 94 U. S. 113, 124; *Nebbia* v. *New York*, 291 U. S. 502, 524; *Slaughter-House Cases*, 83 U. S. 36. Federal interference in this field "is plainly repugnant to the exclusive power of the State over the same subject," *License Tax Cases*, 5 Wall. 462, 471; for the exercise of state police power "is not subject to national supervision." *South Carolina* v. *United States*, 199 U. S. 437, 453.

Under the Ninth Amendment, the people have the right to earn a livelihood, and acquire and use property by engaging in the electric business, subject only to state regulation. Cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *Dent* v. *West Virginia*, 129 U. S. 114, 121; *Duplex Co.* v. *Deering*, 254 U. S. 443, 465; *Buchanan* v. *Warley*, 245 U. S. 60, 74; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111; *Truax* v. *Corrigan*, 257 U. S. 312, 327.

To the extent that federal statutory and administrative methods of disposing of property are constitutional, they are supreme. If not held within their proper limitations they will destroy reserved powers and rights of State and people. See *Butler* v. *United States*, 297 U. S. 1, 74.

Both the Act and the Unified Plan must be judged by their natural and reasonable effect in the situation in which they operate. *Collins* v. *New Hampshire*, 171

U. S. 30, 33–34; *Standard Oil Co.* v. *Graves,* 249 U. S. 389, 394; *United States* v. *Reynolds,* 235 U. S. 133, 148; *Hammer* v. *Dagenhart,* 247 U. S. 251, 275; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 27; *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, 555; *Minnesota* v. *Barber,* 136 U. S. 313, 319.

Pursuant to the intent and purpose of the Act the Authority is engaging in the business of supplying electricity to the public within the States, and regulating its own rates and service, the rates and service of distributors of its power, and the rates of privately owned and state-regulated utilities. If this is valid, the powers of the States and the rights of the people to engage in the business, are *pro tanto* destroyed. Cf. *Walla Walla City* v. *Walla Walla Water Co.,* 172 U. S. 1, 11; *United States* v. *Butler,* 297 U. S. 1, 70–71; *Frost* v. *Railroad Commission,* 271 U. S. 583; *Panama Refining Co.* v. *United States,* 293 U. S. 388.

There is no real or substantial relation between the power to dispose of federal property and the regulation of local electric rates or the establishment within the States of a federal policy of having the local electric business carried on by public or non-profit organizations.

The natural and reasonable effect of the operation of the Act, by bringing about a federal monopoly of the local electric business, is to deprive the States of important tax revenues.

The Federal Government may not exercise its power of taxation so as substantially to burden or interfere with the functions of the States. *Collector* v. *Day,* 11 Wall. 113, 124; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 584; *Ambrosini* v. *United States,* 187 U. S. 1. *Helvering* v. *Gerhardt,* 304 U. S. 405; *Allen* v. *Regents,* 304 U. S. 439, distinguished.

The objection that the statutory and administrative scheme is unauthorized by the Constitution and con-

travenes the Fifth, Ninth and Tenth Amendments can not be cured by the consent of a State. *Ashton* v. *Cameron County Water Dist.*, 298 U. S. 513, 531; *United States* v. *Butler*, 297 U. S. 1, 72; *Carter* v. *Carter Coal Co.*, 298 U. S. 295. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, distinguished. See *United States* v. *Bekins*, 304 U. S. 27, 53; *Northern Pacific R. Co.* v. *Minnesota ex rel. Duluth*, 208 U. S. 583; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548; *Denver & Rio Grande R. Co.* v. *Denver*, 250 U. S. 241; *Keller* v. *United States*, 213 U. S. 138, 144; *New York* v. *Miln*, 11 Pet. 102, 139.

The principles laid down in the *Ashwander Case*, 297 U. S. 288, condemn the method of disposal authorized by the Act and adopted by the Unified Plan.

One threatened with direct and special injury through the application of a federal statute or the act of a federal officer may maintain a suit to determine whether the statute is constitutional or the act is authorized. *Frothingham* v. *Mellon*, 262 U. S. 447, 488; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621–622; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464.

The legal rights which appellants seek to protect are: (1) the right to be free from illegal competition and (2) the right to engage in and carry on the business of supplying electricity to the public within the States free from displacement by the Federal Government and free from federal interference, regulation or control. These rights are entitled to protection both from injury produced by the operation of an unconstitutional statute and from injury produced by unauthorized action of federal officials or agencies.

A non-exclusive franchise is property. It is exclusive as against all persons attempting to engage in the business illegally, without a franchise or under a void franchise. It follows that, there being no adequate remedy

at law, the holder of a non-exclusive franchise has a standing in equity to protect his property against such an injurious invasion. *Frost* v. *Corporation Commission,* 278 U. S. 515, 521; *Corporation Commission* v. *Lowe,* 281 U. S. 431, 435; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 484–485; *City of Campbell* v. *Arkansas-Missouri Power Co.,* 55 F. 2d 560, 562; *Gallardo* v. *Porto Rico Ry. L. & P. Co.,* 18 F. 2d 918, 922; *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F. 2d 911; *Iowa Southern Utilities Co.* v. *Cassill,* 69 F. 2d 703; *Kansas Gas & Electric Co.* v. *City of Independence,* 79 F. 2d 32. This means that the holder of a non-exclusive franchise has a right to invoke a judicial determination of whether any actual or threatened competition with him is legal and, if that involves the constitutionality of a statute or the existence of official authority, then a determination of the constitutional question or of the extent of the official authority. And for the purpose of determining the rights of appellants to sue, it must be assumed that the appellees are attempting to engage in the business illegally, without a franchise or under a void franchise.

The appellants have a right to engage in and carry on the business of supplying electricity to the public within the several States subject only to state regulation and free from ouster, interference, regulation or control by the Federal Government. They have a right to be free from displacement or supersession, in carrying on that business, by the operation of federal statutes or the action of federal agencies which result in taking over the business as a federal enterprise.

It is plain that the appellants are severally threatened with the most severe and destructive sort of competition. That a threat of competition is a threat of irreparable damage is established by the decisions of this Court. *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 12;

Frost v. *Corporation Commission,* 278 U. S. 515, 521; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464.

The right to be free from illegal competition includes competition for future or unattached business. It includes competition for business handled by the Authority through municipal and coöperative distributors. See *Citizens Electric Co.* v. *Lackawanna & W. P. Co.,* 255 Pa. 145; *Chicago* v. *Mutual Electric Light Co.,* 55 Ill. App. 429.

While the existence of such a relationship is not essential to appellants' right to sue, the municipalities and cooperatives are in reality mere agents for the distribution of Tennessee Valley Authority power; and in any event, the Authority so far controls and participates in the sales by distributors that the validity of its participation may be tested at the suit of an injured party. See *United States* v. *General Electric Co.,* 272 U. S. 476; *Mitchell Wagon Co.* v. *Poole,* 235 F. 817; *In re United States Electrical Supply Co.,* 2 F. 2d 378; *In re Wright-Dana Hardware Co.,* 211 F. 908; *Rudin* v. *King-Richardson Co.,* 37 F. 2d 637; *In re Smith,* 192 F. 574; *In re Thomas,* 231 F. 513; *In re Kruse,* 234 F. 470; *John Deere Plow Co.* v. *McDavid,* 137 F. 802; *Ludvigh* v. *American Woolen Co.,* 231 U. S. 522; *McCallum* v. *Bray Robinson Clothing Co.,* 24 F. 2d 35; *In re Renfro-Wadenstein,* 47 F. 2d 238; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.,* 156 F. 1.

Appellants have a clear right to sue. See *United States* v. *Butler,* 297 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Hill* v. *Wallace,* 259 U. S. 44; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464.

Unless appellants are entitled on the record as made to a reversal of the decree with directions to issue an injunction, then the decree of the trial court should be reversed for serious errors in matters of procedure and in rulings on evidence.

Messrs. James Lawrence Fly and *John Lord O'Brian,* with whom *Solicitor General Jackson,* and *Mr. Paul A. Freund, Mr. William C. Fitts, Jr.,* and *Bessie Margolin* were on the brief, for appellees.

The Act sets forth as its basic purposes the improvement of navigation, the control of destructive floods in the Tennessee and Mississippi River basins, and the promotion of national defense. The whole record confirms the legislative judgment that the projects are appropriate means for the accomplishment of the functions prescribed in the statute.

The power generated is lawfully acquired, since these are the only projects capable of providing flood control on the Tennessee and the Mississippi in conjunction with a nine-foot navigation channel on the Tennessee. That the projects will create and maintain a continuous nine-foot waterway throughout the 650-mile length of the Tennessee is undisputed. Not only the main-stream dams, but the two tributary dams as well, will provide substantial benefits to navigation both on the Tennessee and the Mississippi, by virtue of releases of stored water in low-water season.

While the relative advantages and disadvantages of alternative systems are not legally material, the record demonstrates and the trial court found that the projects of the Authority will provide a navigation channel superior to that which could be provided by any alternative system.

Even if the power to construct flood-control works must be rested on the power to improve navigation, the test is met by these projects, since their operation for flood-control purposes results in substantial benefits to navigation. *Jackson* v. *United States,* 230 U. S. 1, 23; *Cubbins* v. *Mississippi River Comm'n,* 241 U. S. 351, 368–369. But Congress has power to promote and protect interstate commerce on land as well as on water, and accord-

ingly to engage in flood-control measures, where, as on the Tennessee and the lower Mississippi, there is a serious flood menace to all forms of interstate commerce. Cf. *Wilson* v. *New,* 243 U. S. 332; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. In addition, its power to cope with the recurring threat of floods can be rested on its power to make expenditures for the general welfare. Cf. *Steward Machine Co.* v. *Davis,* 301 U. S. 548.

The interest of national defense is substantially served by the tributary dams which release water during the low-water season and so enhance the value and usefulness of the Government-owned properties at Muscle Shoals.

In providing works which appropriately serve as navigation and flood-control structures, Congress may determine the size of the projects and the mode and manner of their use, and the power which is thus acquired is the lawful property of the United States. *Arizona* v. *California,* 283 U. S. 423, 456; *Green Bay & M. Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58, rehearing denied, 173 U. S. 179; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53.

The water power created by these projects is the property of the United States, may be converted into electric energy, and, under the property clause of the Constitution all of the electricity so acquired may be disposed of by transmission to the market and by sales to municipalities, rural coöperatives, and industrial customers. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 340.

The Authority is now selling power to the same classes of customers as those served by the lines purchased under the contract approved in the *Ashwander* case. And, as found by the trial court, all of the marketing facilities constructed and operated by the Authority, namely, transmission lines, substations, and rural lines, are sim-

ilar in character and function to the facilities purchased under that contract.

In this case, as in that, the method of disposition is necessary to avoid a private monopoly of the Government's property, to prevent waste, and to secure a widespread distribution of benefits pursuant to the statute.

As authorized by the Act, the Authority's contracts with municipalities and coöperatives establish the resale rates to be charged by the distributors (§ 10). Appellants have no standing to challenge these provisions, since they were voluntarily entered into by the municipalities and coöperatives, which are empowered to do so by valid state law. Any advantage or disadvantage to appellants resulting from the rates adopted by the municipalities and coöperatives is merely the incidental result of the exercise of the rights vested in them by the laws of the States of their creation to set their own rates and to contract with respect to them. *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148; *Sprunt & Son* v. *United States,* 281 U. S. 249, 254–256; *Wilbur* v. *Texas Co.,* 40 F. 2d 787 (App. D. C., 1930), cert. denied, 282 U. S. 843; *Georgia Power Co.* v. *Tennessee Valley Authority,* 14 F. Supp. 673 (N. D. Ga., 1936).

In any event, these provisions of the contracts are valid. The Government is selling at wholesale. The demand for the Government property will be influenced by the rates charged to the ultimate consumer. The Congress, in the position of a trustee of Government property, may therefore authorize this means to assure a widespread diffusion of the benefits to the people. Cf. *Oregon & California R. Co.* v. *United States,* 238 U. S. 393; *United States* v. *Gratiot,* 26 Fed. Cas. 12 (C. C. D. Ill., 1839), aff'd, 14 Pet. 526.

There is no invasion of the rights reserved to the States under the Tenth Amendment, even if it be assumed that the Amendment constitutes an independent limitation

on the exercise of granted powers. The denial of the power of the Congress to construct the necessary transmission facilities and to enter into the necessary contracts for the sale of the power would limit the Authority's market to sales at the dam sites where the Commonwealth and Southern companies are, practically, the only available purchasers.

The conclusive answer to the invocation of the Tenth Amendment is that the means of disposition do not impair the exercise of the States' police power. The Authority is dealing with municipalities and coöperatives who are subject at all times to the complete control of the States, and the state courts have determined that there is no abdication of state powers. *Memphis Power & Light Co.* v. *Memphis,* 172 Tenn. 346 (1937); *Oppenheim* v. *Florence,* 229 Ala. 50 (1934). An arrangement by which the State authorizes its agencies, at their election, to purchase property from the Government, still retaining in the State the right of regulation and control, can give rise to no questions under the Tenth Amendment. Cf. *Steward Machine Co.* v. *Davis, supra; United States* v. *Bekins,* 304 U. S. 27. The States may authorize municipalities to construct and operate electric plants in competition with the appellant companies even though the result is harmful to the business of the companies. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464. To the extent that this competition is related to the wholesale service of the Authority, the case is one of the federal exercise of the granted power to dispose of public property by sales to local public agencies who themselves engage in an enterprise authorized by the States. Such coöperation is permitted by the Constitution and not forbidden by the Tenth Amendment. *Duke Power Co.* v. *Greenwood County,* 91 F. 2d 665, 673 (C. C. A. 4th, 1937); cf. *Steward Machine Co.* v. *Davis, supra; United States* v. *Bekins, supra.*

Moreover, any effect of competition upon appellants' rates does not constitute regulation and is only the collateral effect of the exercise of a granted power. *Duke Power Co.* v. *Greenwood County, supra;* cf. *Sonzinsky* v. *United States,* 300 U. S. 506, 513–514; *United States* v. *Carolene Products Co.,* 304 U. S. 144.

The scope of the projects necessary for the disposition of public property is a question for Congress to determine. Cf. *Arizona* v. *California, supra; United States* v. *Hanson,* 167 F. 881 (C. C. A. 9th, 1909).

The resale-rate provisions of the contracts do not deprive the States of their power to regulate intrastate rates and are not in violation of the Tenth Amendment. There cannot be any impairment of state sovereignty where, as here, the States have authorized the contracts and have reserved a continuing power to revoke the authorization. Cf. *Steward Machine Co.* v. *Davis, supra; United States* v. *Bekins, supra.*

The sale of power by the Authority and its wholesale customers does not constitute regulation, and the loss of appellants' business, if any, is not a "taking" of their property under the Fifth Amendment. *Sonzinsky* v. *United States, supra; Standard Scale Co.* v. *Farrell,* 249 U. S. 571; *Pennsylvania R. Co.* v. *United States R. Labor Board,* 261 U. S. 72; *United States* v. *Los Angeles R. Co.,* 273 U. S. 299. Cf. *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1; *Joplin* v. *Southwest M. Light Co.,* 191 U. S. 150; *Helena Water Works Co.* v. *Helena,* 195 U. S. 383; *Puget Sound Co.* v. *Seattle,* 291 U. S. 619.

Appellants have no standing to maintain this suit. Their municipal and county street franchises, licenses, or easements, at the most, confer only the right to enjoin the use of the streets and highways by one competing with appellants without a like franchise, license, or easement. No showing has been made that the Authority's facilities occupy the public streets and highways. Moreover,

whatever the nature of the rights conferred by local street franchises, licenses, or easements, it is conceded that the Authority has been granted such rights by the local authorities in the areas in which it operates.

The only so-called "state franchises" which appellants, as a class, possess are corporate privileges derived under the general state laws governing incorporation and the qualification of foreign corporations. Such corporate "franchises" obviously confer no immunity from competition. Cf. *Railroad Co.* v. *Ellerman,* 105 U. S. 166. Appellants have not been required to obtain certificates of convenience and necessity to serve in the area in which the Authority is operating. Consequently, appellants are not within the protection of *Frost* v. *Corporation Comm'n,* 278 U. S. 515.

In any event, the statutes in all the States in which the Authority is under contract to sell electricity within the claimed territory of appellants have exempted the Authority from the jurisdiction of the regulatory commissions and from the requirement of certificates of convenience and necessity. The validity of these exemptions is not challenged as unlawfully discriminatory. The decision of this Court in the *Frost* case (278 U. S. 515) merely holds that one who is required to obtain a certificate of convenience and necessity may enjoin competition by one who is subject to the same statutory provisions and has failed to comply with their terms. *Carolina Power & Light Co.* v. *South Carolina Public Service Authority,* 94 F. 2d 520 (C. C. A. 4th, 1938), cert. denied, 304 U. S. 578. It is insufficient answer that the powers of the Federal Government may not be enlarged by state enactments. The validity of these state statutory exemptions (which is not challenged by appellants) may be supported without regard to the constitutional validity of the Tennessee Valley Authority Act.

In addition to their lack of the necessary franchises, nine of the appellant companies are not shown to be threatened with damage by any concrete act of the appellees. In the claimed territory of these appellants the Authority neither owns electric facilities nor has it negotiated any contracts for the sale of power. As to these appellants, obviously no justiciable controversy is presented. *Ashwander* v. *Tennessee Valley Authority, supra.* Four other appellants, all members of the Commonwealth and Southern system, have purchased a large proportion of the total amount of the power developed and generated at the projects of the Authority, both at the switchboard and, in the case of the Alabama Power Company, at the end of the Authority's transmission line; and all of them have received many other benefits under the provisions of the Act now challenged. Acceptance of these benefits estops these appellants from questioning the validity of the provisions of the Act under which the benefits were received. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469. The decision in the *Ashwander* case held merely that the purchase of power at the dam site under the circumstances of that case did not preclude an attack on separable provisions of the statute authorizing the acquisition of transmission facilities and is clearly distinguishable from the case at bar.

Finally, the competition of which the appellants complain is the competition of the municipalities and cooperatives and not of the Authority, and under the decision in *Alabama Power Co.* v. *Ickes, supra,* the appellants cannot challenge the validity of the contracts between the Authority and these municipalities and coöperatives. Appellants' legal interest is the same whether the permanent electric supply of the municipal

and coöperative distribution system is generated by facilities owned by the United States or by facilities owned by the distributor but constructed by means of federal loans and grants.

The potential damage alleged to result from the loss of the wholesale municipal and coöperative markets served by the Authority is wholly speculative and unreal. Neither the municipalities nor the coöperatives were potential customers of the appellants. The same is true of the large electrochemical and electrometallurgical industries under contract with the Authority which have located in the claimed territory of the Commonwealth and Southern companies.

On the whole record, appellants have failed to show a sufficient legal interest to maintain this suit, and the case presented does not admit of judicial determination.

The trial was fair and exhaustive. On the whole record, it is clear that the rulings of the trial court on evidence and procedure were well within its discretion, and, in any event, appellants have failed to show any prejudicial error sufficient to justify or even to permit the remand of a case of this character.

Mr. Justice Roberts delivered the opinion of the Court.

The Tennessee Valley Authority Act [1] erects a corporation, an instrumentality of the United States, to develop by a series of dams on the Tennessee River and its tributaries a system of navigation and flood control and to sell the power created by the dams. Eighteen corporations which generate and distribute electricity in Tennessee, Kentucky, Mississippi, Alabama, Georgia, West Virginia, Virginia, North Carolina, and South Carolina, and one

[1] Act of May 18, 1933, 48 Stat. 58, as amended by Act of August 31, 1935, 49 Stat. 1075; 16 U. S. C. § 831, *et seq.*

which transmits electricity in Tennessee and Alabama, filed a bill in equity, in the Chancery Court of Knox County, Tennessee, against the Authority and its three executive officers and directors. The prayers were that the defendants be restrained from generating electricity out of water power created, or to be created, pursuant to the Act and the Authority's plan of construction and operation; from transmitting, distributing, supplying or selling electricity so generated, or to be generated, in competition with any of the complainants; from constructing, or financing the construction of, steam or hydro-electric generating stations, transmission lines or means of distribution, which will duplicate or compete with any of their services; from regulating their retail rates through any contract, scheme or device; and from substituting federal regulation for state regulation of local rates for electric service, more especially by incorporating in contracts for the sale of electricity terms fixing retail rates. The defendants removed the cause to the United States District Court for Eastern Tennessee and there answered the bill. As required by the Act of August 24, 1937,[2] a court of three judges was convened which, after a trial, dismissed the bill.[3]

Fourteen of the complainants are here as appellants.[4] They contend that water power cannot constitutionally be created in conformity to the terms of the Tennessee Valley Authority Act, and the United States will, therefore, acquire no title to it, because it will not be produced as an incident of the exercise of the federal power to im-

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[2] 50 Stat. 751, 752, 28 U. S. C. § 380a.

[3] 21 F. Supp. 947.

[4] Georgia Power Company was enjoined from maintaining the action. See *Georgia Power Co.* v. *Tennessee Valley Authority,* 17 F. Supp. 769; 89 F. 2d 218, 302 U. S. 692. Four other complainants have since been permitted to withdraw from the litigation without prejudice to its prosecution by the remaining appellants.

prove navigation and control floods in the navigable waters of the nation. They affirm that the statutory plan is a plain attempt, in the guise of exerting granted powers, to exercise a power not granted to the United States, namely, the generation and sale of electric energy; that the execution of the plan contravenes the Fifth, Ninth, and Tenth Amendments of the Constitution, since the sale of electricity on the scale proposed will deprive the appellants of their property without due process of law, will result in federal regulation of the internal affairs of the states, and will deprive the people of the states of their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation. The appellees contest these contentions. For reasons about to be stated we do not consider or decide the issues thus mooted.

The Authority's acts, which the appellants claim give rise to a cause of action, comprise (1) the sale of electric energy at wholesale to municipalities empowered by state law to maintain and operate their own distribution systems; (2) the sale of such energy at wholesale to membership corporations organized under state law to purchase and distribute electricity to their members without profit; (3) the sale of firm and secondary power at wholesale to industrial plants.

The appellants are incorporated for the purpose and with the authority to conduct business as public utilities. Several do so only within the states of their incorporation; those chartered elsewhere have qualified as foreign corporations under the laws of the states in which they manufacture, transmit, or distribute electricity. Most of them have local franchises, licenses, or easements granted by municipalities or governmental subdivisions but it is admitted that none of these franchises confers an exclusive privilege.

While the Authority has not built or authorized any transmission line, has not sold or authorized the sale of electricity, or contracted for, or authorized any contract for, the sale of electricity by others, in territory served by nine of the appellants, it has done some or all of these things in areas served or susceptible of service by five of the companies; and it plans to enter in the same way the territory of other appellants. It is clear, therefore, that its acts have resulted and will result in the establishment of municipal and coöperative distribution systems competing with those of some or all of the appellants in territory which they now serve, or reasonably expect to serve by extension of their existing systems, and in direct competition with the appellants' enterprises through the sale of power to industries in areas now served by them or which they can serve by expansion of their facilities. The appellants assert that this competition will inflict substantial damage upon them. The appellees admit that such damage will result, but contend that it is not the basis of a cause of action since it is *damnum absque injuria*,—a damage not consequent upon the violation of any right recognized by law.

The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent.[5] The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a priv-

[5] *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Stafford* v. *Wallace*, 258 U. S. 495, 512; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. The same rule applies to suits against state officers: *Osborn* v. *The Bank*, 9 Wheat. 738, 857, 859; *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Sterling* v. *Constantin*, 287 U. S. 378, 393.

ilege.[6] The appellants urge that the Tennessee Valley Authority, by competing with them in the sale of electric energy, is destroying their property and rights without warrant, since the claimed authorization of its transactions is an unconstitutional statute. The pith of the complaint is the Authority's competition. But the appellants realize that competition between natural persons is lawful. They seek to stigmatize the Authority's present and proposed competition as "illegal" by reliance on their franchises which they say are property protected from injury or destruction by competition. They classify the franchises in question as of two sorts,—those involved in the state's grant of incorporation or of domestication and those arising from the grant by the state or its subdivisions of the privilege to use and occupy public property and public places for the service of the public.

The charters of the companies which operate in the states of their incorporation give them legal existence and power to function as public utilities. The like existence and powers of those chartered in other states have been recognized by the laws of the states in which they do business permitting the domestication of foreign corporations. The appellants say that the franchise to be a public utility corporation and to function as such, with incidental powers, is a species of property which is directly taken or injured by the Authority's competition. They further urge that, though non-exclusive, the local franchises or easements, which grant them the privilege to serve within given municipal subdivisions, and to occupy streets and public places, are also property which the Authority is destroying by its competition. Since

[6] *In re Ayers*, 123 U. S. 443; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Ex parte Young*, 209 U. S. 123; *Scully* v. *Bird*, 209 U. S. 481; *Philadelphia Co.* v. *Stimson, supra; Lane* v. *Watts*, 234 U. S. 525; *Truax* v. *Raich*, 239 U. S. 33; *Lipke* v. *Lederer*, 259 U. S. 557.

what is being done is justified by reference to the Tennessee Valley Authority Act, they say they have standing to challenge its constitutionality.

The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal. The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition,[7] and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field.[8] The local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise.[9] The grantor may preclude itself by contract from initiating or permitting such competition,[10] but no such contractual obligation is here asserted.

The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in

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[7] See *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 548; *Turnpike Co.* v. *The State,* 3 Wall. 210, 213; *Hamilton Gas Light Co.* v. *Hamilton City,* 146 U. S. 258, 268; *Pearsall* v. *Great Northern Ry. Co.,* 161 U. S. 646, 664.

[8] Compare *Lehigh Water Co.* v. *Easton,* 121 U. S. 388.

[9] *Joplin* v. *Southwest Missouri Light Co.,* 191 U. S. 150; *Helena Water Works Co.* v. *Helena,* 195 U. S. 383, 393; *Madera Water Works* v. *Madera,* 228 U. S. 454; *Green* v. *Frazier,* 253 U. S. 233; *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 624.

[10] *Walla Walla* v. *Walla Walla Water Co., supra; Superior Water, L. & P. Co.* v. *Superior,* 263 U. S. 125.

damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires,* that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria,* and will not support a cause of action or a right to sue.[11]

Certain provisions of state statutes regulating public utilities are claimed to confer on the appellants the right to be free of competition. Each of the states in which any of them operates, save Mississippi,[12] has established a commission to supervise and regulate public utilities. While the statutes [13] differ in their provisions, all but that of Virginia require a public utility to obtain a certificate of convenience and necessity as a condition of doing business. The appellants commenced business in the various states prior to the adoption of the requirement of such certificates and, so far as appears, they have none covering their entire operations. They have, however, obtained certificates for extensions made since the passage of the statutes; and they claim that, in any event, these

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[11] *Railroad Co.* v. *Ellerman,* 105 U. S. 166, 173; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479–483, and cases cited; *Greenwood County* v. *Duke Power Co.,* 81 F. 2d 986, 997; *Duke Power Co.* v. *Greenwood County,* 91 F. 2d 665, 676; affirmed 302 U. S. 485.

[12] In Mississippi there is no State Commission, but municipalities are given the authority to regulate utilities within their territorial limits. Mississippi Code (1930) §§ 2400–1, 2414.

[13] Alabama Code (1928) § 9795; Carroll's Kentucky Statutes (1936) § 3952–25; North Carolina Code (1935) § 1037 (d); Williams' Tennessee Code (1934) §§ 5502–3; South Carolina Code (1934 Supp.) § 8555–2 (23); Virginia Code (1936) §§ 3693–3774k; West Virginia Code (1937) § 2562 (1).

laws afford them protection from the Authority's competition since any utility now seeking to serve in their territory must obtain a certificate, and hence they have standing to maintain this suit against the Authority which has none. The position cannot be maintained. Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to alteration at the will of the legislature.[14] The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking in it.

Moreover, the states in which the Authority is now functioning have declared their policy in respect of its activities. Alabama has enacted that federal agencies, instrumentalities, or corporations shall not be under the jurisdiction of its Public Service Commission;[15] that municipalities and improvement authorities may own and operate electric generating and distributing systems and may contract with a federal agency such as the Authority for the purchase of energy, and stipulate as to the use of the energy, including rates of resale;[16] that nonprofit membership corporations may be formed for the distribution among their members of electricity with like power to contract with the Authority for the required energy.[17] Tennessee has amended § 5448 of its Code, which defines public utilities, so as to exclude federal corporations such as the Authority from the jurisdiction of the State Utilities Commission;[18] has authorized municipalities to own and operate electric generating transmission and distribution systems and to contract for power

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[14] Compare *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, 292; *Williams* v. *Wingo*, 177 U. S. 601, 604.

[15] Alabama Acts, Regular Session 1935, No. 1.

[16] Alabama Acts, Regular Session 1935, No. 155.

[17] Alabama Acts, Regular Session 1935, No. 45.

[18] Tennessee Public Acts 1935, ch. 42, p. 98.

with the Authority on terms deemed appropriate, including the fixing of resale prices; [19] has authorized the formation of nonprofit membership electric corporations with like powers to contract.[20] Kentucky has authorized municipalities to establish and maintain light, heat, and power plants; [21] and has provided for the organization of nonprofit coöperative electric corporations which may contract with the Authority for purchase of energy and stipulate as to resale prices.[22] Mississippi, which has no state law for regulation of utilities, has empowered municipal and county governments to establish and maintain electric distribution systems which may buy power from the Authority and contract as to resale prices; [23] has created a rural electrical authority and authorized the formation of power districts and nonprofit competitives, all competent to purchase energy from the Authority and distribute it and to contract with the Authority as to resale rates to consumers.[24] The Authority's action in these states is consonant with state law, but, as has been shown, if the fact were otherwise, the appellants would have no standing to restrain its continuance.

As the Authority has not acted in any way in North Carolina, South Carolina, Virginia or West Virginia, the appellant's contention that its proposed entry into some or all of them confers a right to sue for an injunction against injury thereby threatened has even less support.[25]

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[19] Tennessee Public Acts 1935, ch. 32, p. 28; Tennessee Public Acts 1935, ch. 37, p. 78.

[20] Tennessee Public Acts 1937, ch. 231, p. 882.

[21] Carroll's Kentucky Statutes (1936) §§ 3480 d-1 to 3480 d-22.

[22] Kentucky Acts, Fourth Extraordinary Session, 1936–1937, ch. 6, p. 25.

[23] Mississippi Laws, 1936, ch. 185, p. 354; ch. 271, p. 531.

[24] Mississippi Laws, 1936, ch. 183, p. 334; ch. 187, p. 370; ch. 184, p. 342.

[25] In fact several of the states in question have statutes which would to some extent, and in some circumstances, permit the pur-

The appellants may not raise any question of discrimination forbidden by the Fourteenth Amendment involved in state exemption of the Authority from commission regulation. For this reason *Frost* v. *Corporation Commission,* 278 U. S. 515, on which they rely, is inapplicable. Manifestly there can be no challenge of the validity of state action in this suit.

A distinct ground upon which standing to maintain the suit is said to rest is that the acts of the Authority cannot be upheld without permitting federal regulation of purely local matters reserved to the states or the people by the Tenth Amendment and sanctioning destruction of the liberty said to be guaranteed by the Ninth Amendment to the people of the states to acquire property and employ it in a lawful business. The proposition can mean only that since the Authority sells electricity at rates lower than those heretofore maintained by the appellants such sale is an indirect regulation of appellants' rates. But the competition of a privately owned company authorized by the state to enter the territory served by one of the appellants would, in the same sense, constitute a regulation of rates. The contention amounts to saying that competition by an individual or a state corporation is not regulation but competition by a federal agency is. In contracting with municipalities and nonprofit corporations the Authority has stipulated respect-

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chase and use of power created by the Authority. In all of them municipalities may establish and operate their own distribution systems: North Carolina Code (1935) § 2807; South Carolina Code (1932) §§ 7278–7280, 8262; Virginia Code (1936) § 3031; West Virginia Code (1937) §§ 494, 591 (86). North Carolina and Virginia have statutes permitting the formation of coöperatives which may buy power from the Authority under contracts fixing resale rates: Public Laws of North Carolina, 1935, ch. 291, p. 312; Virginia Code (1936) ch. 159 A. South Carolina has created a State Rural Electrification Authority with power to buy electricity from any federal agency: South Carolina Code (1936 Supplement) §§ 6010–2 ff.

ing the price at which the energy supplied shall be resold by its vendees. That is said to be a regulation of the appellant's business. But it is nothing more than an incident of competition; it is but a method of seeking and assuring a market for the power which the Authority has for sale, and a lawful means to that end.[26] The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.[27] These considerations also answer the argument that the appellants have a cause of action for alleged infractions of the Ninth Amendment.

Finally, it is asserted that the right to maintain this suit is sustained by certain allegations of concerted action by the officials of the Authority and the Public Works Administrator. The bill alleges that having adopted an unlawful plan the defendants have coöperated, and threaten to continue to coöperate in its execution, with Harold L. Ickes, as Administrator of the Federal Administration of Public Works, in a systematic campaign to coerce and intimidate the complainants into selling their existing systems in municipalities or territory in which the Authority desires to seize the market for electricity; that, in order to make this coercion effective, Ickes has, in coöperation with, or on request of, the Authority, announced loans and grants of federal funds to municipalities; that the Authority and Ickes have coöperated, and continue to do so, to force municipalities to purchase the

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[26] *Oregon & California R. Co.* v. *United States*, 238 U. S. 393; *United States* v. *Gratiot*, 26 Fed. Cas. 12, 13–14; affirmed 14 Pet. 526.

[27] Compare *Georgia Power Co.* v. *Tennessee Valley Authority*, 14 F. Supp. 673, 676.

Authority's power under threats that, unless they do, proposed loans and grants for municipal systems will not be made. The bill states that, though Ickes "confederated and acted with the defendants in some of its illegal acts and is, therefore, a proper party, he is not a necessary party and is not joined as a defendant because he is beyond the jurisdiction of the court." There is a prayer that the defendants be restrained from confederating and acting in concert with Ickes for the described ends.

The District Court finds that the Authority has not indulged in coercion, duress, fraud, or misrepresentation in procuring contracts with municipalities, coöperatives or other purchasers of power; has not acted with any malicious or malevolent motive; and has not conspired with municipalities or other purchasers of power. The record justifies these findings. It is claimed, however, that they are inconclusive since the court erroneously excluded much proffered evidence tending to sustain the charge. An examination of the record discloses that certain of the evidence offered was properly excluded, and that in other instances the rejection of that offered constituted, at most, harmless error.

Error is assigned to the trial court's refusal to permit the taking of the deposition of the Public Works Administrator. In view of the prior opportunity which the claimants had to take this deposition, the lateness of the application, and other factors, permission to take the deposition was a matter within the court's discretion and it does not appear that the discretion was abused.

The remaining assignments of error directed to the exclusion of evidence of coöperation between the two federal agencies go to the rejection of evidence consisting largely of correspondence between them and press releases or announcements by officers of one or the other. The record contains all but a few of these rejected docu-

ments, those omitted apparently not being thought of importance. Scrutiny of them compels the conclusion that if the rejected evidence had been admitted, the trial court's holding that a conspiracy had not been proved should not be overruled.

The only findings on this subject requested by the appellants were to the effect that the Public Works Administration has coöperated with and assisted the Tennessee Valley Authority in the furtherance of the latter's power program and that the former has made contracts and allotments for loans and grants to twenty-three municipalities in the states of Alabama, Mississippi, and Tennessee, amounting to about fourteen million dollars, for the purpose of constructing municipal systems to distribute the Authority's power in competition with the appellants; that the applications for loan and grant in some instances specify that the municipal system will duplicate a privately owned system; in others that a large business will be done by the municipal plants because of the low promotional rates of the Authority; that some of the applications state they were filed to take advantage of the low rates offered by the Authority and that, with few exceptions, they state that the electricity to be distributed in the city will be purchased from the Authority. A further requested finding is that the applications of certain Alabama cities recite that they have secured written contracts from practically all consumers; that these contracts refer to lower rates to be secured, provided the rates charged by the city shall be thus prescribed by the Authority for resale at retail. The court refused to make the requested findings and error is assigned to this refusal. It is apparent that if the court had made the findings no conclusion of confederation or conspiracy, with malicious intent to harm the appellants or to destroy their business, would thereby have been required.

Coöperation by two federal officials, one acting under a statute whereby funds are provided for the erection of

municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy to injure their business. As the court below held, such coöperation does not involve unlawful concert, plan, or design, or coöperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute.

In no aspect of the case have the appellants standing to maintain the suit and the bill was properly dismissed.

The decree is

Affirmed.

MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER.

The decision just announced goes too far. It excludes from the courts complainants seeking constitutional protection of their property against defendants acting, as it is alleged, under invalid claim of governmental authority in setting up and carrying on a program calculated to destroy complainants' business. The issues joined by the parties, tried below and fully presented to this Court, include the question whether, when construed to authorize the things done and threatened by defendants, the challenged enactment is authorized by the Constitution or repugnant to the Fifth, Ninth, and Tenth Amendments. The issues also include the question whether, as being applied, the Act is void because the execution of defendants' program will deprive complainants of their property without due process of law in contravention of the Fifth Amendment. This Court holds complainants have no standing to challenge the validity of the Act and puts aside as immaterial their claim that by defendants' unauthorized acts their properties are being destroyed.

The opinion states: "The Authority's acts which the appellants claim give rise to a cause of action, comprise (1) the sale of electrical energy at wholesale to municipalities empowered by state law to maintain and operate their own distribution systems; (2) the sale of such energy at wholesale to membership corporations organized under state law to purchase and distribute electricity to their members without profit; (3) the sale of firm and secondary power at wholesale to industrial plants."

That the substance of complainants' case may not be so compressed is disclosed by the summary of their bill that follows:

Complainants are 19 public utilities. Each, authorized by law, is engaged in generating and selling electricity within the political subdivisions of various States. Some have long-term contracts under which they furnish large quantities of electricity. They are more than able to fill the needs of the territories in which they operate and are ready to supply such additional facilities as may be needed in the future. Their properties are modern and economically operated and possess great value as going concerns. Their rates yield no more than a reasonable return and are fully regulated by the States in which they serve.

Defendants are the Tennessee Valley Authority, a body corporate created by the Act of May 18, 1933, with the right to sue and be sued, and its three directors, charged with the duty of exercising the powers of the Authority. Harold L. Ickes, the Administrator of the Public Works Administration, has confederated with defendants in some acts charged to be illegal; he is not sued because beyond the jurisdiction of the court. From its principal office at Knoxville, Tennessee, the Authority carries on a proprietary business as a public utility for the generation, transmission, distribution and sale of electricity in Tennessee, Mississippi, Georgia and Alabama.

On its face, the Act discloses purpose to authorize a large and indeterminate number of great works for the primary purpose of creating a vast supply of electric power, to use this power to establish the United States in the business of producing, transmitting, and selling electric power, and to dispose of this power in a manner inconsistent with the principles of our dual system and so as to govern the concerns reserved to the States. Any references in the Act to navigation or to any other constitutional objective are unsubstantial and mere pretenses or pretexts under which it is sought to achieve an object reserved to the States. Except with respect to power available at Wilson Dam prior to the acts complained of, the program is one of creating an outlet for power deliberately produced as a commercial enterprise to be sold in unlawful and destructive competition with power now available in adequate quantities.

The program contemplates ultimately the development of all power sites on the Tennessee River and all its tributaries as an integrated electric power system, the construction and operation of hydro-electric plants at these sites, the use of auxiliary steam plants, the interconnection of all plants, and the elimination of existing privately owned utilities.

In the area of over 40,000 square miles, there are 149 water power sites which, with auxiliary steam plants, will produce 25 billion k. w. h. annually. Present consumption of the area is 56% of that quantity. The electric power to be produced by defendants can only be sold through displacement of the complainants. Execution of the program will necessarily destroy all or a substantial part of the business and property of each of the complainants.

Defendants have taken over Wilson Dam and the nitrate plant and have commenced, or recommended to Congress, the construction of 10 other dams; their pro-

gram calls for 11 completed dams by July 1, 1943. They have prepared plans for the construction of high-tension transmission lines from the dams to at least 14 cities and indeed to the whole area. They have purchased or are attempting to purchase distribution systems in at least 15 cities. They have entered into contracts to sell power to various communities and industries for a 20-year period and have agreed to supply firm power to other and larger cities.

The avowed purpose of the program is to effect a federal regulation of intrastate electric rates and service by a so-called "yardstick" method or "regulation by competition." The yardstick for wholesale rates is the wholesale rate charged by the Authority. It is unreasonable and confiscatory as a measure of complainants' rates in that it excludes the cost of the major part of the investment necessary to render the service and excludes necessary operating expenses. The yardstick for retail rates is the sum of the wholesale rate and the amount which the Authority allows municipalities to add to the wholesale rate to cover cost of local distribution; it excludes many items of necessary cost of rendering the service.

Pursuant to a plan promulgated in 1933, defendants are conducting a systematic campaign for the purpose of disrupting the established business relations between complainants and their customers, destroying the good will built up by complainants, seizing their markets and inciting the residents of communities served by them to coöperate with defendants in their scheme to develop an absolute monopoly.

With full knowledge of the noncompensatory and confiscatory character of the yardstick rates, they have represented to the inhabitants of communities served by complainants that these "yardsticks" were fair measures of reasonable rates and have thereby attempted to incite the

inhabitants to build publicly owned systems using power furnished by the Authority, to lead them to believe that they are being charged unreasonable rates, to stir up political agitation against privately owned utilities and to bring complainants into disrepute and disfavor.

The defendants attempt to coerce complainants to sell distribution systems and transmission lines, in territories which defendants intend to appropriate, at prices far below fair value by threatening that, unless complainants accede, they will construct, or cause to be constructed, duplicate facilities subsidized in construction and operation by federal funds and render complainants' properties wholly valueless. The Administrator of the Public Works Administration has coöperated with defendants. Defendants inform the owners that, unless they sell, either the Authority or the municipalities will build duplicate systems with federal funds. At defendants' request, the Administrator authorizes and announces a gift to the municipality of from 30% to 45% of the cost of the duplicate system and agrees to lend the balance, repayable out of earnings, if any, of the duplicate plant, upon condition that the municipality will agree to use power of the Authority and will, as soon as possible, oust the existing utility. If the utility agrees to sell, the allotments are canceled without regard to the will of the municipality. This policy has already been applied in certain cities. The defendants and Administrator also coöperate to force municipalities to agree to purchase power furnished by the Authority by threats that otherwise federal allotments for public works will be canceled or denied.

Defendants have caused bills, designed to forward their power program, to be submitted to the legislatures of various States in the area and have lobbied for and brought about their passage. They have installed Authority personnel throughout the area to disseminate

propaganda in behalf of the program. The Electric Home and Farm Authority, a corporation set up as a governmental agency of which the individual defendants are directors, finances sale of electrical devices, prints and circulates costly advertising in praise of the Authority program. Defendants have offered to supply electricity to large industrial customers of some of the complainants at noncompensatory and discriminatory rates. They have attempted to persuade complainants' customers to break existing contracts. Complainants cannot meet this competition because of the noncompensatory rates and because they are forbidden by state law to make discriminatory rates.

The bill prays invalidation of the Act as unconstitutional and injunction and other relief against defendants.

Unquestionably, the bill shows that complainants are not asserting a right held, or complaining of an injury sustained, in common with the general public. They allege facts that unmistakably show that each has a valuable right as a public utility, non-exclusive though it is, to serve in territory covered by its franchise, and that, inevitably the value of its business and property used will suffer irreparable diminution by defendants' program and acts complained of. If, because of conflict with the Constitution, the Act does not authorize the enterprise formulated and being executed by defendants, then their conduct is unlawful and inflicts upon complainants direct and special injury of great consequence. Therefore, they are entitled to have this Court decide upon the constitutional questions they have brought here. See *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *Frost* v. *Corporation Commission,* 278 U. S. 515, 521.

MR. JUSTICE MCREYNOLDS joins in this opinion.

INLAND STEEL CO. *v.* UNITED STATES ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 227. Argued January 3, 4, 1939.—Decided January 30, 1939.

1. In a suit by a shipper to set aside an order of the Interstate Commerce Commission requiring a carrier to cease paying the shipper tariff allowances for spotting cars in the shipper's plant, which the Commission had found unlawful, the District Court in granting an interlocutory injunction imposed the condition, without objection from the shipper, that further payments be withheld by the carrier, in a separate account, to be paid over to the shipper or canceled upon further order of the court. *Held* within the equitable power of the court, though not requested by the carrier nor, specifically, by the Commission. P. 156.
2. The power of the District Court so to impound the allowances and, finally, upon sustaining the Commission and dismissing the bill, to order that the fund be retained by the carrier, was not affected by the fact that because of the preliminary injunction, the carrier had kept in force its published tariff providing for the allowances, or by the fact that for the same reason the Commission had undertaken to postpone the effective date of its order. Pp. 158, 159.
3. Apart from the primary issue of the validity of the allowances, it was not necessary that evidence be taken and special findings be made with respect to the disposition of the impounded fund. P. 161.

Affirmed.

APPEALS from decrees of the District Court in suits to set aside orders of the Interstate Commerce Commission restraining carriers from paying allowances for spotting cars to plaintiff-appellant shippers. See 23 F. Supp. 291. These appeals were directed only to provisions of

* Together with No. 228, *Chicago By-Product Coke Co.* v. *United States et al.*, also on appeal from the District Court of the United States for the Northern District of Illinois.

the final decrees requiring that funds resulting from impounding of the allowances during the suit be retained by the carriers.

Mr. John S. Burchmore, with whom *Mr. Nuel D. Belnap* was on the brief, for appellants.

Mr. Edward M. Reidy, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Elmer B. Collins, Daniel W. Knowlton,* Chief Counsel, I. C. C., and *Nelson Thomas* were on the brief, for appellees.

Mr. Justice Black delivered the opinion of the Court.

In No. 227, after full hearings the Interstate Commerce Commission, on July 11, 1935, found and reported [1] that the Indiana Harbor Belt Railroad was engaged in the practice of paying an allowance for appellant's service in spotting cars in appellant's plant; [2] that appellant was performing this plant service for its own convenience; that the Railroad was under no legal obligation to spot the cars and therefore the allowance was paid for service for which the Railroad was not compensated under line-haul rates; that the allowance was unlawful and afforded appellant a preferential service, not accorded to shippers generally, amounting to refund or remission of part of the rates charged or collected as compensation for transporting freight. On the same date, an order of the Commission incorporated its report and findings, including the finding that "by the payment of said allowances the Indiana Belt Railroad Company violates the Interstate Commerce Act." This order also directed the Railroad

[1] 209 I. C. C. 747; 216 I. C. C. 8 (No. 228).

[2] "Spotting" involves handling of cars between the point of interchange between the Railroad and appellant and the points at which such cars are unloaded or loaded in appellant's plant.

to "cease and desist on or before September 3, 1935, and thereafter to abstain from such unlawful practice."

August 28, 1935, upon petition of appellant, the District Court, three judges sitting, granted an interlocutory injunction by which the Commission's report and order were "suspended, stayed, and set aside"—"pending the further order of the court"; the Commission was restrained and enjoined from enforcing them; and, the Railroad having previously given public notice that its published tariff providing for the allowance would be cancelled as of September 3, 1935, in accordance with the Commission's order, the injunction suspended the effective date of the cancellation. But the interlocutory injunction also provided "that until the further order of the Court, any and all sums due and payable to plaintiff [appellant], under the . . . tariff providing said allowance, shall be set up by defendant Indiana Harbor Belt Railroad Company on its books of account, which sums so set up shall be paid over to . . . [appellant], or canceled, only upon the further order of this Court, [appellant] . . . by its counsel having agreed in open court to such arrangement, without prejudice."

February 26, 1937, the Commission entered an order purporting to extend the effective date of its command to "cease and desist" to June 15, 1937, but specifically provided that its order of July 11, 1935, should "in all other respects remain in full force and effect."

April 27, 1938, the District Court dismissed appellant's petition for want of equity, dissolved the interlocutory injunction, and ordered the accrued allowances that had been set aside in a special account by the Railroad as required by the interlocutory injunction to "be retained by . . . [the Railroad] as a part of its general funds and said account canceled."

Appellant concedes the correctness of the District Court's decree holding the Commission's order valid, dismissing the petition and denying a permanent injunc-

tion.[3] The appeal only seeks a review of the court's action in ordering that the unlawful allowances accumulated after the date of the interlocutory injunction be retained by the Railroad and not paid to appellant.

First. In granting the interlocutory injunction, the District Court proceeded under a jurisdictional Act which provides that ". . . the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit." [4] Appellant invoked the court's equity powers.[5]

A court of equity "in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial." [6]

In the exercise of its discretion, the District Court imposed conditions in its decree granting appellant's petition for an interlocutory injunction. Appellant neither objected to the conditions nor sought review of the court's action in imposing them, but under the interlocutory injunction enjoyed for three years the suspension—which it had sought—of the Commission's order, pending litigation. Now, the litigation ended, appellant insists that the District Court lacked jurisdiction to do more

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[3] See, *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan-American Petroleum Corp.*, 304 U. S. 156.

[4] 28 U. S. C. 46.

[5] Cf., *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364.

[6] *Russell* v. *Farley*, 105 U. S. 433, 438; *Meyers* v. *Block*, 120 U. S. 206, 214.

than vacate its interlocutory injunction and dismiss the petition, since no pleadings of the Railroad or the Commission sought the creation of the special allowance account. But this overlooks the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect.[7] And the Commission, in defending its report and order, acted under its statutory duty as the representative of the interest which the public, as well as the railroads, have in the maintenance of fair, reasonable and nondiscriminatory transportation practices.[8] Moreover, in intervening the Commission prayed that it have "the benefit of such . . . decrees or relief as may be just and proper."

The Interstate Commerce Commission has primary jurisdiction to determine whether the granting of allowances for services performed by shippers constitutes a discriminatory practice.[9] Here, in the exercise of its primary jurisdiction, the Commission considered the technical questions involved and made findings that the Railroad's practice was unlawfully preferential and discriminatory. In doing so, the Commission was acting in the interest of shippers generally and in behalf of the public and the national railroad system. The District Court, at the behest of this appellant, restrained the enforcement of the Commission's report and order embodying these findings. While thus acting in the interest of

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[7] *Central Kentucky Co.* v. *Railroad Comm'n*, 290 U. S. 264, 271.

[8] *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 146; *Smith* v. *Interstate Commerce Comm'n*, 245 U. S. 33, 42, 43, 45; cf. *Ex parte Lincoln Gas Co.*, 256 U. S. 512, 517; 49 U. S. C. §§ 15a, 43.

[9] *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *St. Louis, B. & M. Ry. Co.* v. *Brownsville Navigation Dist.*, 304 U. S. 295; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

a single shipper, the court properly took steps to protect the other interests—represented by the Commission—from injuries that the injunction might cause. It did so by ordering the payments, which the Commission had found unlawful, to be continued—on condition that they be segregated or paid into a separate account, pending the court's review of the Commission's finding of illegality. This segregated account thus accrued as a result of judicial restraint of administrative proceedings in which the payments had been declared unlawful. When the court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and it became the duty of the court promptly to allocate the fund to its lawful owner.

An equity court having lawful control of a fund, in which there may be interests represented only by a duly authorized governmental agency, has the power and is charged with the duty of protecting those interests in disposing of the fund.[10] Otherwise, rights (such as the right of this Railroad to restitution) might be impaired or cut off while an interlocutory injunction is in effect, as for instance by statutes of limitation. Here, the court had the power and it was its duty so to fashion its equitable decree that appellant should not be the beneficiary of unlawful payments, and to prevent the dissipation of the Railroad's assets through unlawful preferences.

Second. Appellant further insists that the court had no power to impose the particular conditions here, because the Railroad was ordered to retain (in a special account) allowances provided for in its published tariff. This contention rests on the statutory requirement that published tariffs must be observed.[11] However, before the court

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[10] *Central Kentucky Co.* v. *Railroad Comm'n, supra.*

[11] 49 U. S. C. § 6 (7).

acted, the Commission had found and reported—and had incorporated its findings and report in an order—that these allowances provided in the published tariff were unlawful preferences violating the Interstate Commerce Act. The Commission had also ordered that payment of the unlawful allowances cease, and the Railroad had already—in obedience to the Commission's order—published a new tariff eliminating the allowance provision. But, six days before the new tariff would by its terms have become effective, appellant sought and obtained the preliminary injunction which did not destroy, but tentatively suspended the Commission's report and order and also tentatively suspended the Railroad's tariff canceling the unlawful allowance. The Railroad then republished the old tariff, thus—under court order—restoring the unlawful allowance. When the court subsequently dismissed appellant's petition and vacated the interlocutory injunction "in all respects," it thereby found the Commission's report and order valid, and they were then in effect as though the injunction had never been granted. Thus, during the period the injunction was pending (save for the first six days), the published tariff had contained the unlawful allowance solely because of the court's injunction. To sustain the contention of appellant that the provision for allowances in the published tariff limited the authority of the court to prevent their payment would be to clothe a published tariff, in existence solely by reason of equitable intervention, with an immunity from equity itself. The Interstate Commerce Act grants no such immunity.[12]

Third. The appellant takes the position that the Commission's purported postponement of its command to cease and desist (eighteen months after the interlocutory

[12] Cf. *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 511.

injunction was granted) deprived the court of authority to enforce the conditions of its interlocutory injunction. However, since the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction, had it attempted to do so.[13] But, since the Commission had already been enjoined from enforcing its report and order when it entered its postponement, there is no reason to construe the Commission's action as anything more than a recognition of the postponement actually effected by the court's interlocutory injunction.

In addition, there were two separate aspects to the action of the Commission. It found an illegal practice in existence that involved unlawful disbursement of the Railroad's funds, contrary to the public interest. The Commission also entered a cease and desist order to operate prospectively. Even if the Commission's postponement of the cease and desist portion of its order had been operative, the Commission specifically left in effect its ruling that the allowance was unlawful.[14]

The Commission had exercised its primary jurisdiction and had found the allowances unlawful; upon review, the District Court properly approved this finding; the

[13] Cf. *Ford Motor Co.* v. *National Labor Relations Board, supra.* It is, therefore, immaterial that in No. 228 there were consecutive purported postponements of the command to cease and desist, each entered by the Commission before the expiration of the postponement immediately preceding.

[14] Cf. *Terminal Warehouse* v. *Pennsylvania R. Co.*, 297 U. S. 500, 507, 508. A suit at law based on a past alleged discriminatory practice may be stayed in order to permit the plaintiff to obtain the necessary preliminary ruling by the Commission. See *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co., supra; Southern Ry. Co.* v. *Tift*, 206 U. S. 428.

amount in the special allowance account was exactly known and undisputed; this fund could have belonged only to the Railroad or to appellant; the Railroad was in possession of the fund and in equity and good conscience was entitled to retain it. Therefore, there was no necessity to take evidence, and the action of the District Court in disposing of the fund required no additional findings. The final decree of the District Court properly directed that the unlawful allowances should not be paid to appellant, and should be retained by the Railroad.

The questions presented in No. 228 are governed by our conclusions here, and the judgments in both cases are

Affirmed.

UNITED STATES *v.* MIDSTATE HORTICULTURAL CO. ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 286. Argued January 13, 1939.—Decided January 30, 1939.

The Elkins Act, § 1, as amended, denounces, among other offenses, the acts of granting or accepting any rebate or concession whereby property in interstate commerce shall be transported at a rate less than that named in the carrier's published tariffs. It provides that every violation shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and that whenever the offense is begun in one jurisdiction and completed in another it may be dealt with in either. *Held* that where the offenses charged were the granting and receiving of rebates or concessions in re-

* Together with No. 287, *United States* v. *Pennsylvania Railroad Co.*, also on appeal from the District Court of the United States for the Eastern District of Pennsylvania.

spect of transportation which had been completed and paid for at tariff rates before the conception of the criminal transactions, venue was wrongly laid in a district through which the transportation was conducted but which was not the district in which the granting and receiving were alleged to have occurred. P. 163.

Affirmed.

APPEALS under the Criminal Appeals Act from judgments of the District Court sustaining demurrers to indictments.

Mr. Wendell Berge, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. N. A. Townsend, Elmer B. Collins, Frank Coleman,* and *Hugh B. Cox* were on the briefs, for the United States.

Mr. Francis Biddle, with whom *Messrs. Robert V. Massey, Jr., Frederic D. McKenney, Charles Myers,* and *John Dickinson* were on the brief, for appellee in No. 287.

Messrs. Henry Silverman and *Samuel L. Einhorn* submitted for appellees in No. 286.

MR. JUSTICE BLACK delivered the opinion of the Court.

These two appeals present for review a single question. As stated by appellant the sole question in each appeal is "whether or not the indictment charges the commission of an offense against the United States in the Eastern District of Pennsylvania, as it must, if appellees are to be prosecuted therein. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*" [1]

[1] Article 3, § 2, Clause 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by

The defendant in No. 287 was indicted in the Eastern District of Pennsylvania charged with making unlawful rebates on interstate shipments. Defendants in No. 286 were charged, by indictment in the same District, with receiving the unlawful rebates. The District Court sustained demurrers to both indictments. The Government appealed directly to this Court. Appellees moved here to dismiss the appeals on identical grounds. The motions to dismiss are denied in both cases.[2]

The record requires that we treat the indictments to which demurrers were sustained as charging that rebates or concessions were paid and received in New York in 1935 in connection with the transportation of goods in 1932 from California through the Eastern District of

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Law have directed." Amendment 6 of the Constitution so far as pertinent provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . ."

[2] The first ground of the motions to dismiss is that appeal was not taken "within thirty days after the decision or judgment" as required by 18 U. S. C., § 682. The court below wrote an opinion in which it stated "the demurrers are sustained," and filed the opinion June 16, 1938. But in accordance with the court's practice, final order was not entered until July 2, 1938. In that order the court sustained the demurrers and ordered defendants discharged. The Government petitioned for appeal July 20, 1938, within eighteen days after the final order was entered, but more than thirty days after the written opinion had been filed. The appeals were from the judgments and orders of July 2, and not the previous written opinion. The second ground of the motions to dismiss is that the Government did not have a right of direct appeal to this Court granted by 18 U. S. C., § 682, which authorizes such an appeal where judgment sustaining a demurrer "is based upon the invalidity or construction of the statute upon which the indictment is founded." The statute under which the indictments were returned provides expressly for the jurisdiction over offenses created by it, and the record clearly discloses that the rulings on demurrers involved a construction of the statute.

Pennsylvania to New Jersey; that the full lawful rate in accordance with published tariffs was paid when the tansportation took place; and that prior to the time of the payment and receipt of the alleged rebates in New York in 1935 the carrier and shippers had neither agreed nor intended that any rebate or concession should be made. The Government concedes that the jurisdictional provisions of the Elkins Act,[3] on which the prosecutions are based, require trial in the District in which a violation of the Act is committed, but contends that the record discloses violations actually committed in the Eastern District of Pennsylvania. This contention rests upon the argument that the Elkins Act aims primarily to prevent the result of obtaining transportation at less than the lawful rate; that payment and receipt of rebates in 1935 served to accomplish such forbidden results—namely, transportation in 1932 at less than the lawful rate; and, since the transportation in 1932 passed through the Eastern District of Pennsylvania, the offenses were committed and are punishable there.

The statute defines offenses under it as follows: ". . . it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate . . . commerce by any common carrier . . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, . . ." As to venue the statute provides: "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is be-

[3] 49 U. S. C., § 41(1), 34 Stat. 587.

gun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

We need not determine whether Congress intended—by providing for the trial of crimes "within the district . . . through which the transportation may have been conducted"—to confer jurisdiction in any District wherein a violation was not committed. The Government only insists that the indictments here disclose offenses committed in the Eastern District of Pennsylvania, and urges that the provision for trial in any District through which illegal transportation is conducted is without meaning unless applicable to these prosecutions.

But there are many offenses in the Act of which this provision is a part to which the provision is clearly applicable. An illustration is that provided in the case of *Armour Packing Co.* v. *United States,* 209 U. S. 56. There an unlawful concession was given in the State of Kansas before interstate shipment was made. Transportation passed through the State of Missouri. The recipient of the concession was tried in Missouri. It was decided that the transaction constituted a continuing offense beginning in Kansas, and that the defendant could be tried in any District through which the unlawful transportation took place. The Court said (at p. 76): "We think the doctrine [of continuing offenses] . . . applies in the present case, for transportation is an essential element of the offense, and, as we have said, transportation equally takes place over any and all of the traveled route, *and during transportation the crime is being constantly committed.*" (Italics supplied.) The section of the Elkins Act under which the present indictments were drawn describes other offenses and, in addition, makes it a misdemeanor for a carrier to violate any of the numerous criminal provisions of the Interstate Commerce Act.

Congress evidently intended to make it clear that as to any of the many offenses in which "during transportation the crime is being constantly committed" prosecution could be had in any District through which the unlawful transportation moves.

We do not believe Congress intended that subsequent conduct or events should stamp criminality upon an act that was lawful, and wholly unrelated to any unlawful plan or purpose, when done. Here, the full lawful rate was paid for the transportation involved. The lawful transportation through the Eastern District of Pennsylvania was not infected by relation to any unlawful agreement, purpose or intent at the time it occurred. The record shows no offense that began in 1932 and continued until 1935. As was clearly set forth by the Circuit Court of Appeals in the *Armour Packing Co.* case: [4] "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each. . . . The transportation of the goods in this case into and through the Western district of Missouri, at the *illegal through rate,* was the continuing operation and effect in that district of its primary cause, the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder for transportation in foreign commerce, and even if the shipper's offense was complete in Kansas, it may have been committed in Missouri also, where its operation continued and took effect." (Italics supplied.)

The legal transportation of goods at a lawful rate through the Eastern District of Pennsylvania without intent, purpose, or agreement to commit any part of a crime

[4] 153 F. 1, 5, 6. Cf., *United States* v. *Lombardo,* 241 U. S. 73, 77.

did not give the District Court of the Eastern District of Pennsylvania jurisdiction to try these defendants under the Elkins Act. On this record no violation of the Elkins Act was begun, continued or brought about [5] in that District. The demurrers were properly sustained and the judgments are

Affirmed.

SOUTHERN PACIFIC CO. *v.* GALLAGHER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 212. Argued December 12, 1938.—Decided January 30, 1939.

1. California tax on storage and use—i. e., upon retention and exercise of ownership—may be applied consistently with the commerce clause and the due process clause of the Fourteenth Amendment to an interstate railroad company in respect of supplies purchased outside of the State and brought in for prompt application in the operation of its road, such as office supplies, and rails, equipment, machinery, tools, etc., used in replacements, repairs and extensions, and including articles ordered out of the State on specifications suitable only for use in the transportation facilities and installed immediately upon arrival at the California destination. P. 172.
2. There is an interval after the articles have reached the end of their interstate movement and before their consumption in interstate operation has begun when the "use and storage" are subject to local taxation. *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, distinguished. P. 176.

23 F. Supp. 193, affirmed.

APPEAL from a decree of a three-judge district court refusing a permanent injunction and dismissing the bill in a suit to restrain enforcement of the California Use Tax. The court below had at first granted an interlocutory injunction, 20 F. Supp. 940.

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[5] Cf., *United States* v. *Holte*, 236 U. S. 140, 144.

Mr. Harry H. McElroy for appellant.

A state excise tax imposed directly upon the privilege of using instrumentalities in carrying on and conducting interstate and foreign commerce by a railroad common carrier, is a direct burden on such commerce, contrary to the Commerce Clause. *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626; *Helson & Randolph* v. *Kentucky,* 279 U. S. 245; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465; *Ozark Pipe Line* v. *Monier,* 266 U. S. 555; *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Philadelphia S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Fargo* v. *Michigan,* 121 U. S. 230; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 214; *U. S. Airways* v. *Shaw,* 43 F. 2d 148; *Mid-Continent Air Express Corp.* v. *Lujan,* 47 F. 2d 266; *Puget Sound Co.* v. *Tax Commission,* 302 U. S. 90; *Minot* v. *Philadelphia, W. & B. R. Co.,* 17 Fed. Cas. 458; Fed. Cas. No. 9645; 18 Wall. 206; *Pullman Southern Car Co.* v. *Nolan,* 22 F. 276, 280, 281; 117 U. S. 34, 46; *Pacific Telephone & T. Co.* v. *Henneford,* 81 P. 2d 786.

A state excise tax can not validly be applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce. *Cooney* v. *Mountain States Tel. Co.,* 294 U. S. 384; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 314; *Colorado* v. *United States,* 271 U. S. 153; *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563.

The case at bar is distinguished by its facts from the cases in which the privileges taxed were not acts of conducting interstate transportation. Distinguishing *Edelman* v. *Boeing Air Transport,* 289 U. S. 249; 61 F. 2d 319; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249; *Coverdale* v. *Pipe Line Co.,* 303 U. S. 604.

It was said in the opinion in the *Coverdale* case that a narrow distinction of facts exists between the tax held invalid in the *Helson* case and the tax considered valid

in the *Nashville* case. That narrow distinction of facts is the distinction which exists between the taxation of an event separable and completed before use in interstate commerce begins and the taxation of an event which is an inseparable part and act of carrying on interstate commerce.

The unconstitutionality of state excise taxation burdening interstate commerce is not avoided by imposing state taxes at an equal rate on intrastate commerce or other intrastate privileges.

Western Live Stock v. *Bureau of Revenue,* 303 U. S. 250, cited by the lower court, cites many cases and illustrations exemplifying the rule that "even interstate business must pay its own way," but not a single one of them deals with a tax upon action sanctioned and protected by the commerce clause where the manner of imposition of the tax has been direct. They do not modify or criticize the long established rule that where the tax is directly imposed on an interstate privilege the burden is *ipso facto* direct and therefore unconstitutional. *McCulloch* v. *Maryland,* 4 Wheat. 316, 429; *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 227.

It can be said of the tax in question in the case at bar, amounting to more than $300,000, and continuing to accrue in large amounts, as was said by this Court in *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, that "conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce." *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, distinguished. See *Pacific Telephone & T. Co.* v. *Henneford,* 81 P. 2d 786.

The tax is discriminatory in its operation and effect, and if the decision of the lower court is sustained the way will be open for serious discriminatory abuses in state

and municipal taxation of the instrumentalities of interstate commerce.

The taxation of the use of property, inseparably used by a railroad interstate carrier in the transaction of its transportation business, both within and without the State, without apportionment, would be extraterritorial in its operation and effect and in violation of the due process clause of the Federal Constitution.

Mr. H. H. Linney, Deputy Attorney General of California, with whom *Messrs. U. S. Webb,* Attorney General, and *James J. Arditto,* Deputy Attorney General, were on the brief, for appellees.

By leave of Court, *Messrs. G. W. Hamilton,* Attorney General of Washington, and *R. G. Sharpe,* Assistant Attorney General, filed a brief, as *amici curiae,* in support of appellees.

Mr. Justice Reed delivered the opinion of the Court.

The California Use Tax Act of 1935 [1] is assailed as violative of the commerce clause and the Fourteenth Amendment, when imposed upon tangible personal property, bought outside of the state by the Southern Pacific Company, an interstate railroad, and installed on importation, or kept available for use, as a part of its transportation facilities.

The attack comes by means of a bill of the Southern Pacific Company seeking, before a three-judge district court,[2] an interlocutory and final injunction against the State Board of Equalization of California, its members and the Attorney General of the state, to restrain them from enforcing the Use Tax Act.[3] The trial court granted

[1] Cal. Stats. 1935, ch. 361.

[2] § 266, Jud. Code, 28 U. S. C. § 380.

[3] As the bill was filed July 10, 1936, there was jurisdiction. 50 Stat. 738.

an interlocutory injunction and denied a motion to dismiss [4] but later refused a permanent injunction and sustained the motion to dismiss.[5] The case comes here by appeal.[6]

The Use Tax Act is complemental to the California Retail Sales Tax Act of 1933.[7] The latter levies a tax upon the gross receipts of California retailers from sales of tangible personal property; the former [8] imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government. Definitions in the Use Tax Act of taxpayer, retailer, storage and use are designed to make the coverage complete. A retailer is "every person, engaged in the business of making sales for storage, use or other consumption"; use is the exercise of any right or power incident to ownership, except sale in the regular course of business; storage is any "keeping or retention" with a similar exemption; and a taxpayer includes everyone "storing, using or otherwise consuming" the property subject to the use tax.[9]

The principle of the use tax as applied to property brought into the state after its retail purchase for intrastate use has been upheld in *Henneford* v. *Silas Mason Co.*,[10] against the charge that it was a tax upon the operations of interstate commerce or a tax upon a foreign

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[4] *Southern Pacific Co.* v. *Corbett*, 20 F. Supp. 940.

[5] *Id.*, 23 F. Supp. 193.

[6] § 266, Jud. Code, 28 U. S. C. § 380.

[7] Cal. Stats. 1933, ch. 1020, as amended, Cal. Stats. 1935, chs. 351, 355, 357.

[8] California Use Tax Act, *supra*, § 3.

[9] *Id.*, §§ 2, 3.

[10] 300 U. S. 577. Cf. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, *ante*. p. 62.

sale, violative of the Fourteenth Amendment. Under the Washington statute, there considered, discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment of error [11] even though the California Act does not have this provision. It will be time enough to resolve that argument "when a taxpayer paying in the state of origin is compelled to pay again in the state of destination." [12] A discrimination against goods of out-of-state origin on the face of the sales and use acts is suggested because the local retailer may absorb the sales tax while the consumer of an imported article must pay the use tax.[13] But this is not a discrimination in the law. California's exaction for the distribution of tangible personal property is the same, whether purchased within or without her borders or whether paid by the retailer or consumer. There is an equal charge against what is used, whatever its source. In this case we have a distinctly different application of a use tax. The tax is not sought from personal property used in transactions entirely disassociated from any agency connected with interstate transportation, as builders' supplies for local work in the *Silas Mason* case, but from tangible personalty purchased out of the state for immediate or subsequent installation in an interstate railway facility.

The appellant, the Southern Pacific Company, a Kentucky corporation, handles intrastate, interstate and foreign commerce over its railroad system which traverses a number of states and connects with the lines of carriers

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[11] *New York* v. *Kleinert*, 268 U. S. 646, 651.

[12] *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587.

[13] *National Ice & Cold Storage Co.* v. *Pacific Fruit Express Co.*, 95 Cal. Dec. 442, 445–8; 11 Cal. 2d 283; 79 P. 2d 380.

covering the continent. The findings and stipulation of facts show continual extrastate purchases of tangible personalty for the operation of the road; rails, equipment, machinery, tools and office supplies. Some of the purchases are used in the general offices of the corporation, located in California, for the supervision of the wide-flung activities; others are for material kept in readiness as a stand-by supply to replace or repair equipment damaged, destroyed or worn out in the operation of the road; and still others are to make improvements, replacements or extensions pursuant to previously determined plans and specifications. Few, if any, of the supplies are stored for long term needs. Storage is merely incidental to protection until use, as office supplies in a closet or an extra frog at a section tool house. For construction or reconstruction upon a large scale, special orders are given and arrangements made, so that the material is fabricated for a particular use in the transportation facilities, shipped to its California destination and installed upon arrival. To avoid delay and cost the movement from loading to final placement is as nearly continuous as managerial efficiency can contrive. While some articles are capable of general use, the major purchases of rails, repair parts and supplies for the maintenance and operation of the system are adapted only to railroad use. The purchases are paid for out of railroad operating capital and move on company material waybills, without transportation charge. All purchases may be said to be dedicated to consumption in the interstate transportation business of appellant. No new rolling stock is involved. Subsequent to repairing and reconditioning, rolling stock moves again in interstate transportation, as do cars after being stocked with supplies. The California tax on storage or use, it is said, cannot apply to these articles, as such a tax would be an unconstitutional burden upon the facilities of interstate commerce, of which the articles are a part.

There is agreement upon the principle involved. Appellant states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use. They point to the definition of use as the exercise of a right of ownership, and of storage as any keeping or retention. By the definitive terms themselves, it is urged, the taxable events are retention and installation, not such storage as warehousing connotes, or use in the sense of consumption or operation. If we conclude retention and installation, under the circumstances here developed, are intrastate taxable events, viewed apart from commerce, we must still inquire whether taxes laid upon them are not, in effect, upon commerce, and forbidden.[14]

Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages,[15] or freight shipments.[16] A license tax on sales by samples burdens one selling only goods from other states.[17] A tax act as applied to the business of interstate communication [18] is unconstitutional. Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on

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[14] Cf. *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555.

[15] *Telegraph Company* v. *Texas,* 105 U. S. 460.

[16] *Case of the State Freight Tax,* 15 Wall. 232.

[17] *Robbins* v. *Shelby County Taxing Dist.,* 120 U. S. 489, 496, 497; *Brennan* v. *Titusville,* 153 U. S. 289.

[18] *Leloup* v. *Port of Mobile,* 127 U. S. 640.

the commerce itself.[19] This rule is applicable to a tax on gross receipts from interstate transportation; [20] an occupation tax measured by gross receipts from radio broadcasting,[21] and a general tax at specified rates upon the gross income of every resident, construed as "a tax upon gross receipts from commerce" [22] "without apportionment." [23] The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies it upheld.[24]

Appellant selects from this line the *Helson* case [25] as determinative of the contention that a tax on use of supplies or equipment is a tax on the commerce. A state tax of three cents per gallon was imposed on all gasoline "sold at wholesale." This phrase was defined to include gasoline bought out of the state and used within the state. There was no definition of the word use or used. The taxpayers operated an interstate ferry, purchased gasoline in Ohio and used that portion sought to be taxed in propelling their craft in the territorial waters of Kentucky. The court considered the tax on the consumption of the gas the same as a tax on the operation of the ferry

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[19] See the discussion in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434.

[20] *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, 336.

[21] *Fisher's Blend Station* v. *State Tax Comm'n,* 297 U. S. 650.

[22] *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 311.

[23] For comparison with sovereign immunity rule and reason for variation, see *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 157, 158.

[24] *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256, and cases cited. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604, 612; *Ficklen* v. *Shelby County Taxing Dist.,* 145 U. S. 1; and *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, as explained in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* and *Adams Mfg. Co.* v. *Storen, supra,* 312.

[25] *Helson & Randolph* v. *Kentucky,* 279 U. S. 245; see also *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626.

boat and therefore invalid under the rule discussed in the preceding paragraph.

The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. A recent discussion of the topic sets out the precedents in support of a ruling that a tax upon the production of power by the use of which compressors drove natural gas in interstate commerce is valid. Such production is a taxable event distinct from its consumption in commerce.[26] Particular attention is called by the state to the *Wallace* case.[27] There the tax was on "selling or storing or distributing gasoline." It became due on withdrawal from storage. The tax was held applicable to gasoline, purchased out of the state and stored in the state, "when all is withdrawn and used . . . as a source of motive power in interstate railway operation" and valid against the objection that "it is in effect a tax upon the use" in interstate commerce.[28] The invalidity of such a tax arises from a levy on commerce itself or its gross receipts, not upon events prior to the commerce.[29]

The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce. The *Wallace* case, and precedents analogous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed

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[26] *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604, 609.

[27] *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249.

[28] *Id.*, 265–66; see *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, 252; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 479.

[29] *Id.*, 267.

immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon "use or storage," no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun. *Champlain Co.* v. *Brattleboro* [30] and *Carson Petroleum Co.* v. *Vial* [31] are therefore inapplicable. *Bacon* v. *Illinois,*[32] where taxation of grain during stoppage in transit was validated, presents a closer analogy. "Practical continuity" does not always make an act a part of interstate commerce.[33] This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant.[34] The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing

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[30] 260 U. S. 366.

[31] 279 U. S. 95.

[32] 227 U. S. 504.

[33] *Oliver Mining Co.* v. *Lord,* 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165.

[34] *Western Live Stock* v. *Bureau,* 303 U. S. 250, 254, and cases cited.

business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress.

But it is urged by the appellant that our former opinions make this conclusion a departure from precedent; the events are so close to or so inseparably intertwined with interstate commerce, as to be a part of it.[35] *Cooney* v. *Mountain States Telephone Co.*[36] is cited to show that a "state excise tax cannot be validly applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce." The Telephone Company was taxed a sum on each telephone in use. As the instrument was employed part of the time in interstate commerce, this Court held the tax to be upon that commerce and invalid. Since there was no apportionment the entire tax fell. Unless the taxable events here, all of which are intrastate, are in effect a part of interstate commerce, our previous discussion of their separable character would render the *Cooney* case inapplicable. For this point we are referred to *Puget Sound Co.* v. *Tax Commission*[37] and *Ozark Pipe Line Corp.* v. *Monier.*[38]

In the former case, the distinction in the opinion between stevedoring in loading and unloading interstate cargoes, held non-taxable as a burden upon commerce, and the business of supplying longshoremen for others to load and unload, held taxable as a local business, is

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[35] Cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583.

[36] 294 U. S. 384.

[37] 302 U. S. 90.

[38] 266 U. S. 555.

applicable here. The invalid tax in the *Puget Sound* case was on the business of stevedoring, measured by a percentage of gross receipts from interstate activity. The valid tax was a similar percentage on the local activity as an employment agency. Here, under our analysis, we find only intrastate events taxed.[39]

In the *Ozark* case, Missouri sought to justify a franchise tax on a company engaged in the operation of an interstate pipe line by suggesting the tax was upon certain intrastate events, such as operation of communications, repair and purchase of supplies. The tax was forbidden because on the privilege of doing an exclusively interstate business. The opinion is to be read in the light of the statement by the Court of its interpretation of the facts and legal deductions which control its decision. The Missouri Act called for a franchise tax of a percentage of the par of its stock, apportioned to its assets in that state. This Court said that "the tax is one upon the privilege or right to do business," and as the taxpayer "is engaged only in interstate commerce" the tax "constitutionally cannot be imposed." There was then added this paragraph:

"The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or con-

[39] Under the commerce clause the regulatory power of the Congress is customarily exercised on transactions taking place within the state on the principle that such acts are an essential part of interstate commerce. See *Currin* v. *Wallace, ante,* p. 1, and cases cited. Cf. *Townsend* v. *Yeomans,* 301 U. S. 441.

tributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected." [40]

This Court pointed out that the corporation had a license to engage exclusively in interstate business.[41] The language just quoted shows that this Court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax on the franchise an interference therewith because a tax directly upon it.[42] ". . . nothing was done in Missouri except in furtherance of transportation." [43] It was this conclusion of the Court on the factual situation which brought about the *Ozark* decision. Where there is also intrastate activity, an apportioned state franchise tax on foreign corporations doing an interstate business is upheld.[44] A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid.[45] Since the incidence of the California tax as here interpreted is upon events outside of interstate commerce, the *Ozark* opinion is not applicable. There the Missouri tax was upon activities found wholly interstate.

Finally, appellants urge that the tax violates the due process clause of the Fourteenth Amendment because exacted for consumption of office and car supplies outside the state, upon their appropriation in California by the general office to the use of the whole system.[46] This con-

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[40] 266 U. S. 555, 565.

[41] *Id.*, 567.

[42] *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218, 224; *id.*, minority, 236; *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15, 20.

[43] *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 155.

[44] *Id.*, 156.

[45] See also *Atlantic Lumber Co.* v. *Commissioner,* 298 U. S. 553, 556.

[46] *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77; *Frick* v. *Pennsyl-*

tention falls with the determination that the taxable event is the exercise of the property right in California. This Court declined to accept a similar argument in the *Silas Mason Company* case.[47]

Affirmed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER:

MR. JUSTICE MCREYNOLDS and I are of opinion that the judgment should be reversed.

The facts stated in the opinion just announced leave nothing of substance to support its conclusion that the California tax is not upon the operation—maintenance and use—of appellant's railroad for interstate transportation. Discussion can neither obscure nor more plainly disclose the truth that the tax in question directly burdens commerce among the States. Concededly, that is repugnant to the commerce clause as, from the beginning, it has been construed by this Court.

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vania, 268 U. S. 473; *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135.

[47] *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 578.

PACIFIC TELEPHONE & TELEGRAPH CO. *v.* GALLAGHER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 213. Argued December 12, 13, 1938.—Decided January 30, 1939.

California use and storage tax on telephone and telegraph company in respect of equipment, apparatus, materials and supplies purchased outside and shipped into the State in operation, maintenance and repair of its interstate system, *held* constitutional, upon the authority of *Southern Pacific Co.* v. *Gallagher, ante,* p. 167.
23 F. Supp. 197, affirmed.

APPEAL from a decree of a three-judge district court refusing a permanent injunction and dismissing the bill in a suit to restrain enforcement of the California Use Tax. The court below had at first overruled a motion to dismiss and granted an interlocutory injunction.

Mr. Francis N. Marshall, with whom *Messrs. Alfred Sutro* and *Eugene M. Prince* were on the brief, for appellant.

The tax is bad as a direct tax upon the operation of instrumentalities of interstate commerce, falling indiscriminately and without apportionment upon interstate and intrastate use. *Helson & Randolph* v. *Kentucky,* 279 U. S. 245; *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626; *Cooney* v. *Mountain States Telephone Co.* 294 U. S. 384, 393.

The trial court's ruling that the tax may be applied to the storage of property prior to interstate use does not support the decree as to the specific order equipment which is not stored prior to its use in intermingled interstate and intrastate commerce. Likewise, in the case of the stand-by property, there is no preliminary intrastate storage separable from use in the intermingled com-

merce, since it is true in every practical sense, as the trial court specifically found, that the stand-by service in this case is itself a necessary use of the property in the appellant's intermingled interstate and intrastate business.

There is in this case no intrastate enterprise, transaction, or use which is separable from the interstate use of the property. The tax upon the use of the property, either in the immediate rendition of service (specific order equipment) or in a stand-by capacity (stand-by facilities), is, therefore, a direct tax upon interstate commerce. The state statute, properly construed, did not intend to impose such a tax, but if it is otherwise construed, it is unconstitutional in that respect.

The appellees attempt to distinguish the *Helson* case, upon the assumption here of some separable intrastate transaction affecting the property to which the tax applies, is answered by the fact that there is no storage or withdrawal from storage of the specific order equipment. No storage occurs in the moments when the property is temporarily set down in the course of unloading or installation. These are necessary and incidental interruptions of movement. Furthermore, it is settled that a momentary storage comprising a mere temporary interruption of the course of a non-taxable interstate event does not itself acquire an intrastate character and become taxable on that account. *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95; *Champlain Co. v. Brattleboro,* 260 U. S. 366.

To the suggestion that the installation of the equipment may bear the tax, the answer is that the statute does not tax installation. If it did purport to do so it would be invalid in this case. A tax on installation for use is in effect a tax upon the use itself, and would defeat the ends of the constitutional protection. The maintenance of interstate telephone and telegraph lines and repairs in the operation of interstate pipe lines—

necessarily involving the installation of repair parts and improvements—are not separable intrastate activities authorizing the imposition of a state excise tax. *Ozark Pipe Line* v. *Monier,* 266 U. S. 555, 565; *Atlantic Lumber Co.* v. *Commissioner,* 298 U. S. 553, 557.

Installation for interstate use, like loading for interstate shipment, is essentially the act of putting the property in position for interstate activity, and is exclusively in furtherance of the interstate commerce. It is settled that a State can not tax such a closely related incident of interstate commerce as the loading of goods in position for interstate shipment,—*Puget Sound Co.* v. *Tax Comm'n,* 302 U. S. 90; *Hughes Bros Co.* v. *Minnesota,* 272 U. S. 469,—even where the work is done by a separate concern hired for the purpose.

With respect to stand-by facilities, appellees' claim seems to be that this property is part of the general mass of property in the State and hence is subject to the State's general taxing laws. But the performance of the stand-by function, as the facts show and as the trial court held, is use of the property in the interstate-intrastate business; and while all the rest of appellant's plant in use is part of the general mass of property in the State and may be subjected to property taxes, yet the State may not tax the use of that plant in interstate commerce, nor any part of the privilege of intermingled interstate and intrastate use without apportioning the tax to the amount of intrastate use.

The interstate and intrastate business of appellant are inseparably intertwined; the property involved is wholly used in inextricably intermingled interstate and intrastate commerce; and appellees have demanded the tax for the storage, use, or other consumption, of all of the property at the rate of 3% of the purchase price of all of it, without any apportionment for the division of use between interstate and intrastate commerce. Since

there is no transaction separable from the intermingled use, and since the tax necessarily, therefore, falls on the intermingled use, and since the measure of the tax is unapportioned by any allocation of the use, it is plain that the tax is not laid upon the intrastate use alone.

The case coincides with the *Cooney* case. Cf. *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 27. Appellant is compelled to purchase more property by reason of the interstate business than it would if it were engaged in intrastate commerce alone; so that the tax, a fixed percentage of the purchase price of the property, is greater by reason of the interstate business done. *Raley & Bros.* v. *Richardson,* 264 U. S. 157, distinguished.

It is not true that the sale and use taxes are both paid by the purchaser. The California Retail Sales Tax Act of 1933, (Cal. Stats. 1933, p. 2599, ch. 1020) imposes upon retailers, for the privilege of selling tangible personal property at retail, a tax equal to 3% of the gross receipts from their retail sales. In *National Ice & Cold Storage Co.* v. *Pacific Fruit Express Co.,* 11 Cal. 2d 283; 79 P. 2d 380, the Supreme Court of California held that the sales tax is a tax on the retailer and not on the purchaser, and that the provisions for passing the tax on to the purchaser were invalid except in so far as the latter might consent thereto, either expressly or impliedly. It is merely optional with the retailer whether he shall attempt to reimburse himself from the consumer; he may waive the right, *Roth Drug, Inc.* v. *Johnson,* 13 Cal. App. 2d 720, 736; 57 P. 2d 1022, 1029, (approved in the case last cited). The Use Tax Act, on the other hand, makes the tax a direct obligation of the consumer, who must pay the tax—to the retailer if the latter maintains a place of business in California, otherwise directly to the State Board of Equalization.

Obviously, the sales and use taxes are not mutually complementary; moreover, the California tax scheme cre-

ates a heavier deterrent to interstate commerce than to intrastate commerce, because the consumer can not escape the 3% use tax on his purchases interstate, but may escape the 3% sales tax on his purchases intrastate.

Mr. H. H. Linney, Deputy Attorney General of California, with whom *Messrs. U. S. Webb,* Attorney General, and *James J. Arditto,* Deputy Attorney General, were on the brief, for appellees.

By leave of Court, *Messrs. G. W. Hamilton,* Attorney General of Washington, and *R. G. Sharpe,* Assistant Attorney General, filed a brief, as *amici curiae,* in support of appellees.

Mr. Justice Reed delivered the opinion of the Court.

This case involves the same questions as *Southern Pacific Co.* v. *Gallagher, ante,* p. 167. The appellant sought to restrain the State Board of Equalization of the State of California, its members, and the Attorney General of the state from enforcing the Use Tax of 1935. A three-judge court granted an interlocutory injunction. Later, it denied a permanent injunction and dismissed the appellant's bill [1] for the reasons stated in *Southern Pacific Co.* v. *Corbett,* 23 F. Supp. 193.

The appellant, a California corporation, operates a telephone and telegraph system in interstate and intrastate commerce. The same plant, facilities and organization are devoted to both interstate and intrastate business. In the necessary operation, maintenance and repair of its system, the appellant purchases outside California large amounts of equipment, apparatus, materials and supplies which are shipped to it in interstate commerce at various points within the state. The tangible

[1] *Pacific Tel. & Tel. Co.* v. *Corbett,* 23 F. Supp. 197.

personal property which the appellees threaten to tax is of two general classes: specific order and stand-by equipment. The first consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and telegraph lines, which are purchased on specific order for installation at a particular place in the system. The second comprises goods bought from time to time for holding as stand-by supplies to meet fluctuating demands and emergencies and to make repairs.

The specific order equipment is shipped to the appellant at the place of use. Its representative receipts for the goods at the dock or breaks the seal of the railroad car, and its employees unload the goods from the dock or car into its trucks. In most instances the trucks are driven directly to the building where the equipment is to be installed; in some, to distributing centers for reloading into other trucks which are driven to the place of installation. Occasionally, private branch exchange switchboards must be held by the appellant until the place of installation is ready. There is no holding in warehouses. The stand-by supplies which constitute a reserve to meet current requirements are replenished by monthly orders. The appellant's trucks pick them up at the dock or railroad depot and carry them to storage places at points on the system suitable for prompt distribution. When needed, the stand-by facilities are taken out of the stores and installed.

The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co.* v. *Gallagher, ante,* p. 167.

The decree of the lower court dismissing the appellant's bill is

Affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

CITY OF TEXARKANA *v.* ARKANSAS LOUISIANA GAS CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 294. Argued January 4, 5, 1939.—Decided February 6, 1939.

1. A franchise granted to a utility company by the City of Texarkana, Texas, contained a section (§ IX) providing that if the company should "be finally compelled to, or should voluntarily, place in any rates" for the adjacent City of Texarkana, Arkansas, less than those fixed by the franchise, then such lower rates should apply also in the Texas city and the company "shall not be authorized or permitted to charge and collect any higher rate." *Held:*

(1) The section was not invalid as a delegation or abdication of the power of the Texas city under its charter to regulate the business and fix the rates of public utilities. P. 196.

(2) By the law of Texas, the section was binding on the utility company, although, because of the reserved power to raise or lower the rates, not binding on the municipality. P. 197.

Grant of the franchise is consideration for the undertaking of the utility to maintain the prescribed rates until they are altered by the exercise of the reserved power of the municipality to regulate the rates. P. 200.

(3) Earlier decisions of this Court to the effect that under the law of Texas a municipality could not validly make a rate contract with a public utility because inconsistent with its reserved power to regulate rates are inapplicable because (a) the state supreme

court in a subsequent decision has indicated that the contract and regulatory powers may be exercised concurrently, and (b) the charter of the municipality here involved specifically empowers it to enter into franchise agreements with rate regulation reserved. P. 201.

(4) When the utility voluntarily put into effect in the Arkansas city rates lower than those granted by the franchise, then the consumers in the Texas city were immediately entitled to the lower rate. P. 202.

(5) Where a rate order applicable in the Arkansas city was challenged by the utility, the latter is not "finally compelled" to "place in" the rate until entry of the final order of a court making the rate effective; but when such final order is entered, the Texas consumers are entitled to have the lowered rate applied to their consumption for the same period of time that it is enjoyed by the Arkansas consumers. P. 202.

(6) A supplemental petition seeking to give the Texas consumers the benefit of a lower rate which had been decreed for the Arkansas city, but from which decree an appeal by the company was pending, was premature. P. 203.

(7) Upon remand of this case to the District Court for further proceedings, leave should be granted—the Arkansas rate case having finally been determined—to file a supplemental petition to bring to date the controversy over the refund of charges by the company. P. 203.

(8) Section IX is not invalid as vague, indefinite and obscure. P. 204.

(9) Section VIII–A of the franchise, relative to notice of application for increase or decrease in rates, is by its terms inapplicable to the power of the city to increase rates. P. 197.

2. Questions of the validity and construction of a franchise granted under state law to a utility company are to be determined by the federal court in accordance with the law of the State. P. 198.
3. This Court relies upon the trial court for aid in the examination and interpretation of the local law. P. 198.
4. A respondent in certiorari here may urge affirmance of the judgment of the Circuit Court of Appeals on a ground assigned by him on his appeal to that court as requiring judgment in his favor but which it did not pass upon. P. 198.
5. Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper. P. 203.

6. That the rates stipulated in a binding contract between a utility and a municipality are inadequate is not a defense to their enforcement. P. 204.

97 F. 2d 5, reversed.

CERTIORARI, 305 U. S. 584, to review a decree which, upon appeal from the District Court in a suit brought by the city against the utility company reversed and remanded with instructions to dismiss the bill.

Mr. Benjamin E. Carter, with whom *Mr. Ed B. Levee, Jr.* was on the brief, for petitioner.

Messrs. William C. Fitzhugh and *Henry C. Walker, Jr.*, with whom *Mr. William H. Arnold, Jr.* was on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

A writ of certiorari brings to this Court for review a judgment[1] of the Circuit Court of Appeals for the Fifth Circuit denying the validity or applicability of the following section in a franchise granted to respondent by petitioner in 1930. Section IX of that franchise reads as follows:

"If Grantee shall be finally compelled to, or should voluntarily, place [sic] in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

Texarkana, Texas, and Texarkana, Arkansas, are adjacent cities divided by the Arkansas-Texas state line. Respondent serves as a public utility for the distribution of gas in

[1] *Arkansas Louisiana Gas Co.* v. *Texarkana*, 97 F. 2d 5.

both cities. Because of the section just quoted, the Texas city undertook judicial action to secure gas for itself and its citizens at rates lower than those stated in other sections of the franchise. We granted certiorari [2] on account of asserted conflict with the decisions of the state courts on an important question of local law.

The charter of the Texas city gives authority to grant franchises for the use of its public ways upon terms to be embodied in ordinances, which must expressly provide that the city shall retain the regulation of the business of the utility, the fixing of its rates and the right to inspect its operations. Should these reservations be omitted, they are nevertheless to be considered part and parcel of the franchise.[3] The charter also provides that the city shall have the power to regulate rates charged by gas com-

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[2] 305 U. S. 584.

[3] Sec. 160. "The rights of the City of Texarkana in the use of the public streets, alleys, squares, parks, bridges and all public places are hereby declared to be inalienable to any person, firm or corporation, except by license permit and franchise passed by the city council on the affirmative vote of three-fifths of all the members of said council elected."

Sec. 163. "Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege of regulating and controlling the operation of all business done thereunder, fixing fares, rates, tolls and charges and inspecting the business and work from time to time as it progresses, and rate regulations shall conform to Section 197 of this charter."

Sec. 163a. "In the event that any franchise or permit is so given by said council, which shall not contain such stipulations therein as provided for in Section 162 of this charter, then it shall, nevertheless, be considered that all of the said stipulations contained in said Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein, and the said applicant so accepting such franchise, as well as their heirs, assigns and successors, shall be held and firmly bound thereto, notwithstanding such omissions."

panies.[4] The gas company and its predecessors had long held a franchise for furnishing gas to the Texas city. The earliest ordinances of the city were amended in 1923, by which amendment certain rates for gas were fixed. Article E in that ordinance provided that the gas company should "not at any time charge for furnishing gas" to the Texas city "a greater sum . . . than it at the same time charges and collects" from the Arkansas city. On June 17, 1930, the gas company accepted a compromise agreement, in ordinance form, which increased the rates to gas consumers from those set out in the 1923 franchise. This is the ordinance containing the § IX heretofore quoted and it is the ordinance regulating rates now in effect in the Texas city.

On May 30, 1930, the gas company secured a similar arrangement adjusting rates from the Arkansas city. There had previously been in effect a franchise of 1923 with rates substantially identical with the Texas 1923 rates. The Arkansas franchise of 1930 was subjected to a referendum and to prolonged litigation. Eventually, on December 1, 1933, a final order set aside the 1930 ordinance of the Arkansas city and established the rates of the 1923 ordinance as effective for the consumers of the Arkansas city from 1930 to the date of the decree. This

[4] Sec. 196. "That the city council shall have the power to regulate by ordinance the rates and compensation to be charged by all water, gas, light and telephone companies, corporations or persons using the streets and public grounds of said city and engaged in furnishing water, gas, light and telephone service to the public, and to prescribe reasonable rules and regulations under which such commodities shall be furnished and services rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual costs of the physical properties, equipments and betterments. Said city council may also fix the charges which may be collected for transporting passengers and baggage in vehicles engaged in public service."

decree also required refunds to the Arkansas consumers for overpayment during that period.[5] By further litigation, a resolution of the council of the Arkansas city of December 22, 1933, promulgating rates for the future was upheld.[6] These last rates were the 1923 rates, modified in minor particulars. In the order of December 4, 1936, confirming the rates established by its resolution, the gas company was directed to refund to the consumers any overpayment by reason of the collection of higher rates during this last judicial proceeding. It thus appears that the legal rates to the consumers of the Arkansas city at all times have been substantially those of the 1923 ordinance.

In Texarkana, Texas, the consumers have paid since 1930 the rates fixed in that ordinance, which are substantially higher than those finally determined as applicable to the Arkansas consumers. The gas company in October, 1933, sought from the Texas city council rates still higher than those granted by the 1930 ordinance. The company gave notice that on November 23, 1933, a new and higher schedule of rates than those provided in the 1930 agreement would be established in the Texas city. The Texas city sought and obtained in the state court an injunction against this increase. This is still effective. This suit was removed to the federal district court for Texas. The bill was amended on January 15, 1934, to set up an additional cause of action against the gas company by reason of the entry of the decree on December 1, 1933, in the Arkansas litigation. As this decree was a final order determining that the Arkansas consum-

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[5] *Arkansas Louisiana Gas Co.* v. *Texarkana,* 97 F. 2d 5, 6, col. 2; cf. *Southern Cities Distributing Co.* v. *Carter,* 184 Ark. 4; 41 S. W. 2d 1085, appeal dismissed 285 U. S. 525, 526; *Texarkana* v. *Southern Cities Distributing Co.,* 64 F. 2d 944, cert. denied 290 U. S. 650.

[6] *Arkansas Louisiana Gas Co.* v. *Texarkana,* 17 F. Supp. 447; affirmed 96 F. 2d 179; cert. denied, 305 U. S. 606.

ers should pay only the 1923 rates, the Texas city conceived its citizens should have the benefit of the same lower rates by virtue of § IX. It was further sought by this amendment to recover for the affected time a refund for the Texas consumers equal to the difference between the Arkansas rates, as determined by the decree of December 1, 1933, and the Texas 1930 rates. Later, on December 30, 1936, a supplemental bill was filed to set out the further claim of the Texas city consumers, for the period between that covered by the first amendment and the filing of the supplemental bill, together with a prayer that the gas company be compelled to pay into the registry of the court the excess amount which it was alleged it had and was continuously collecting from the Texas consumers. Immediate distribution was asked for the funds applicable to those periods concerning which no further Arkansas litigation was pending.

The situation from the standpoint of the Texas city might be summarized by saying that it seeks for its consumers the lower 1923 Arkansas rates instead of the Texas 1930 rates, from the effective date of the Arkansas resolution of May 30, 1930, to February 16, 1934. This refund is claimed because the Arkansas consumers obtained these lower rates by the Arkansas decree of December 1, 1933, and the voluntary act of the gas company in collecting the lower rates from the date of the decree to February 16, 1934. On final affirmance of the Arkansas litigation, it seeks refunds for its consumers from February 16, 1934, to December 4, 1936, of the difference between the Texas 1930 rates and the Arkansas December 22, 1933, rates. This refund is claimed because of the decree of December 4, 1936,[7] validating for the Arkansas consumers the rates of the 1933 resolution. These rates were sub-

[7] United States District Court, Arkansas: *Arkansas Louisiana Gas Co.* v. *Texarkana,* Cause No. 219.

stantially the same as those fixed in the 1923 ordinance. As an injunction, pending appeal, was refused, these lower rates have been in effect in Arkansas since the date of the decree. As pointed out above, the decree was affirmed by the Circuit Court of Appeals and certiorari refused here. It is further sought to have put into effect in Texas the rates collected in Arkansas after December 4, 1936. The right to the lower rates and to the refund depends upon the interpretation of § IX.

Another bill was filed by the Texas city in May, 1934, seeking substantially the same relief as that sought in the proceeding heretofore detailed. The reasons for the filing of this second suit and its purpose are not material to the present proceeding. The two actions were consolidated. Later motions, pleadings and the decree in the two cases are the same.

The gas company filed answers to the bills set out above and a counterclaim seeking higher rates. Section IX was challenged as invalid because of conflict with the provisions of the city charter, the laws and constitution of Texas. It was asserted that the section was not a binding contract on either party to the franchise and further asserted that if § IX was valid, it was inapplicable to any of the three periods for which the Texas city sought relief and refund. The district court granted the city's motion to strike the answers and counterclaim and, the gas company declining to amend, decreed that § IX was a binding contract between the parties; that it was inapplicable to the period prior to December 1, 1933; that refund should be made from December 1, 1933, to February 16, 1934; and that the suit was premature as to the period after February 16, 1934, because an appeal was pending in the Circuit Court of Appeals for the Eighth Circuit at the time the second amendment was filed by the Texas city on December 30, 1936. The Circuit Court of Appeals reversed and remanded with directions to dismiss

the bill.[8] It thought that § IX was an invalid abdication or delegation of the Texas city's rate-making power since the section purported to bind both parties to lower rates which might be fixed by the gas company and the Arkansas city. The lower court stated also, without discussion, that the clause was inapplicable even if valid. The petition for certiorari relies upon the alleged error of the lower court in deciding that the section was invalid and inapplicable.

Abdication or delegation of regulatory power. By the act to incorporate the city of Texarkana, Texas, the legislature granted a special charter which contained delegations of power to the municipality to contract for utilities and to regulate gas rates, and prohibitions against the granting of a franchise without specific reservation of this power of future regulation.[9] The respondent takes the position that since § IX not only requires the application of lower Arkansas rates to Texas consumers but provides that the gas company "shall not be authorized or permitted to charge and collect any higher rate," the Texas city has abdicated power to raise the Texas rates above the Arkansas rates. As the Texas city is forbidden to give up the power to regulate rates, the section, says the company, is invalid.

The city agrees that any delegation or abdication of complete power to regulate rates would be unlawful and any provision of a franchise leading to that result invalid under the decisions of Texas.[10] It is the petitioner's po-

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[8] *Arkansas Louisiana Gas Co.* v. *Texarkana*, 97 F. 2d 5.

[9] The provisions are set out in notes 3 and 4, *supra*.

[10] *Uvalde* v. *Uvalde Electric & Ice Co.*, 250 S. W. 140; *Texas Gas Utilities Co.* v. *Uvalde*, 77 S. W. 2d 750; *Nairn* v. *Bean* (Com. 1932), 48 S. W. 2d 584, 586; cf. *Railroad Comm'n* v. *Weld & Neville*, 96 Texas 394, 405; 73 S. W. 529; *Missouri-Kansas & T. R. Co.* v. *Railroad Comm'n*, 3 S. W. 2d 489, 493; *Green* v. *San Antonio Water Supply Co.* (Civ. App.), 193 S. W. 453.

sition, however, that a proper interpretation of the section leaves with the city the unimpaired power to regulate the gas rates, within the limits of the applicable constitutional provisions. We agree with this analysis of the section. The words just quoted prohibiting the charge or collection of higher rates more reasonably imply a limitation on the right of the gas company to look to other provisions of the franchise for authority to exact other rates. But if this view is not accepted, it is quite clear that the charter provision 163a retaining the right to regulate must be read into the franchise. This would result in leaving in the council of the Texas city the power to raise or lower the gas rates.

Nor, in this view, can it be said there is delegation as distinct from abdication of the power to regulate. It is true, extra-state action determines that the rate shall lessen, but the council has power over the rates at all times. The Arkansas rate is a mere measuring rod, as though the rate fluctuated with temperature or consumption. Even if § VIII-A [11] is valid, in the face of §§ 163, 163a and 196 of the charter, it is inapplicable, by its terms, to the power of the city to increase rates.

The obligation of the utility under section IX. As the lower court determined § IX is wholly invalid as a delegation and abdication by the city of its rate making powers, there was no occasion for it to consider whether the

[11] Section VIII-A. "In consideration of the granting of this franchise, it is mutually agreed and understood by and between the parties hereto that before the City Council of said City shall apply for a reduction in rates, or before the Southern Cities Distributing Company, its successors or assigns, shall make application for an increase in rates, either party shall give to the other party one year's notice in writing of its intention to so apply for an increase or decrease in rates, and no application for increase or decrease in rates shall be acted upon or considered unless said one year's notice is first given before making such application."

section was binding upon the utility alone. With the conclusion that the city is free to raise or lower the rate, in the public interest, we must inquire whether the gas company is bound to furnish Texas consumers their gas at the lessened Arkansas rates. The determination follows the state law.[12] This court looks to the trial court for the original examination of local questions[13] and relies for aid upon the explanation of its conclusion. While no opinion was written in the trial court, its decree found § IX a "binding contract" and awarded recovery for a portion of the time involved. Assuming the district court agreed with this Court that the city could not and did not delegate or abdicate its rate making function, this necessarily required a holding that the company alone was bound by this section of the contract. An appeal, with specific assignment of this ruling as error, brought the case to the Circuit Court of Appeals and the point is argued here by respondent as justification for the judgment reversing the District Court.[14] Under these circumstances, we feel constrained to pass upon the question.[15]

It cannot be said that any opinion of the Supreme Court of Texas settles the problem of whether a utility is bound to a contract for a schedule of rates when the municipality is not. That court, in 1925, in *Dallas Railway Co.* v. *Geller,* did state that an ordinance on rates is a contract.[16] There had been a franchise with a fixed

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[12] § 34, Act of September 24, 1789, c. 20, 1 Stat. 73, 92, 28 U. S. C. 725; *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539, 543; *Railroad Comm'n* v. *Los Angeles Ry. Corp.,* 280 U. S. 145, 151.

[13] *Railroad Comm'n* v. *Los Angeles Ry. Corp.,* 280 U. S. 145, p. 164 dissent, n. 1.

[14] *Langnes* v. *Green,* 282 U. S. 531, 538.

[15] Cf. *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 206.

[16] 114 Texas 484; 271 S. W. 1106.

maximum rate. The municipality granted an increase. A citizen objected on the ground that the franchise, as a contract, bound the municipality and the utility to the agreed rate. The Court of Civil Appeals [17] held the rate section of the franchise was not a "fixed contract" but a rate schedule, subject to the city's power of regulation by reason of § 17 of Article 1 of the Texas Constitution forbidding uncontrollable grants of special privileges. On review, the Supreme Court stated that a question had been raised by city attorneys, appearing as *amici curiae,* as to the meaning of the language of the lower court which was construed by some to hold that "a municipality cannot make contracts that are binding upon public service corporations." [18] While the court could have avoided comment on the point upon the theory that whether or not there was a contract, the city's regulatory power was unaffected, it chose to interpret the franchise in the light of the contract in these words: "The right or power to further control or regulate the grant in regard to the rate schedule is a reservation to the municipality and not an inhibition to contract; and where a franchise is accepted by a grantee, this reservation . . . becomes a part of the contract." Later the Supreme Court, in discussing the power of the legislature to authorize specifically binding rate contracts for definite periods, citing the *Uvalde* case, said, "It is well established in this state that the Legislature . . . may authorize municipal corporations to enter into contracts" for rates for limited periods.[19] We reason from these opinions that in Texas a

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[17] *Geller* v. *Dallas Ry. Co.,* 245 S. W. 254, 256.

[18] It was stated in petitioner's brief and not denied that after the decision in *Uvalde* v. *Uvalde Elec. & Ice Co.,* 250 S. W. 140, discussed in the next paragraph, briefs were filed in the Supreme Court in the *Geller* case arguing the effect of the *Uvalde* decision.

[19] *Lower Colorado River Authority* v. *McGraw,* 83 S. W. 2d 629, 638; 125 Texas 268.

utility franchise is a contract, with an express or implied provision that the rate schedules are subject to regulation by the city. In such a contract an agreement by the utility to lower rates under specified conditions is binding, although the rule as to the reserved power of regulation prevents the city from agreeing not to raise or lower rates. Grant of the franchise is consideration for the undertaking of the utility to maintain the prescribed rates until they are altered by the exercise of the reserved power of the municipality to regulate rates.

The case of *Uvalde* v. *Uvalde Electric & Ice Co.*, 1923,[20] is suggested as an authority against interpreting a rate contract, invalid as to the city, as binding upon the utility. Uvalde, without power to contract for rates, did so contract. The utility raised the rates without permission. The court was of the view that "the power to regulate rates and the power to stipulate by contract for a term of 10 years for rates cannot coexist." Looking at the contract in this way and without discussion of the effect of the attempted agreement on the utility, an injunction against the new rates was refused. That case appears rather a precedent for the rule that where a city is not authorized to contract as to rates but only to regulate them, any effort to contract is nugatory. As indicated above, it has been cited by the Supreme Court of Texas as authority for the right of a municipality to contract when so empowered.

This Court has had other occasions to consider the rights of Texas utilities under the provisions of the Texas statutes and constitution. In *San Antonio Traction Co.* v. *Altgelt*[21] we assumed a rate contract between the city and the street railway, and ruled that it was subject to

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[20] 250 S. W. 140. Compare *Texas Gas Utilities Co.* v. *Uvalde*, 77 S. W. 2d 750, 752.

[21] 200 U. S. 304, 308.

§ 17 of the Texas bill of rights,[22] which declared that all privileges granted by the legislature remained under its control. Consequently, an enactment changing the rate agreement was valid. Later, 1920, in *San Antonio* v. *San Antonio Public Service Co.*[23] in passing upon a rate increase by a utility in the face of a franchise limitation we ruled that § 17 of the constitution, with its provision against irrevocable special privileges, made impossible a contract in Texas on rates because of the conflict between the right to contract and the superior and inconsistent power to regulate. To the argument that the company might be bound, though the city was not, the court replied: If the city is not bound "it would follow that that power [uncontrolled regulatory] would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory." [24]

These conclusions of this Court are inapplicable here for two reasons: first, the subsequent opinion of the Supreme Court of Texas in the *Geller* case indicates that regulatory and contract power may be exercised concurrently in that state; second, the charter of Texarkana, Texas, gives it specific power to enter into franchise agreements with rate regulation reserved to the city.[25] The

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[22] Constitution of State of Texas, Bill of Rights, Vernon's Texas Statutes 1936, Art. I, p. XXV, § 17. "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

[23] 255 U. S. 547, 555, 556.

[24] Cf. *Railroad Comm'n* v. *Los Angeles Ry. Corp.*, 280 U. S. 145, 151. But cf. *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232, 233.

[25] §§ 163, 163a, 196, notes 3 and 4, *supra*.

utility was chargeable with notice in 1930 of the rule in Texas, restated in the Texarkana charter, that rate regulatory power remains in the municipality, and the charter provision to that effect was reserved in the franchise by force of law. It contracted, nevertheless, to furnish the Texas city gas at the same rates as Arkansas consumers enjoy. There appears no reason why such an agreement should not be enforceable and, in our view of the Texas law, it is.

Applicability. The trial court determined that § IX was not to be applied to the period prior to December 1, 1933; that it should be applied to the period December 1, 1933, to February 16, 1934, and that the effort to recover refunds for the period after February 16, 1934, was premature. The Circuit Court of Appeals thought the section, if valid, generally inapplicable. We are of the opinion that the language of the section was intended to and does make applicable to each Texas consumer the same rates that Arkansas consumers are charged for similar uses and quantity, when the Arkansas rates are lower than the rates granted Texas consumers by the ordinance of the City of Texarkana, Texas, of June 13, 1930. This flows from the words in § IX "place in any rates" less than the Texas ordinance rates.

The lower rates for Texas are to be effective only when the utility is "finally compelled to, or should voluntarily, place in" effect the lower rates for Arkansas. When a rate is voluntarily placed in effect in Arkansas, the Texas consumers are immediately entitled to the same rate. We construe "finally compelled" as meaning the entry by a court of the final order which makes effective a challenged rate order. No right to demand the lower rate and no cause of action to enforce the right arises until that time. When such order is entered, however, the Texas consumers are entitled to have the lowered rate applied to their consumption for the same period of time

it is enjoyed by the Arkansas consumers. The purpose of the clause was to give Texas consumers the advantage of lower Arkansas rates for similar periods of time. Litigation, regardless of its merit, may not stay the beginning of the lower Texas rate. In our view, so much of the relief sought as was based upon the challenged rate order of December 22, 1933, was premature.[26] As there was an appeal from the decree of December 4, 1936, it was ineffective to create a cause of action when the supplemental petition of December 30, 1936, was filed.

Leave to file a supplemental petition to bring to date the controversy over the refund of rates, collected subsequent to February 16, 1934, should be granted, upon the return of the case to the District Court, on motion of the City of Texarkana, Texas. The present action is an appropriate proceeding for the settlement of the entire rate controversy and the refund of such sums as may be determined, ultimately, to be due the Texas consumers.[27] Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy.[28] We think this procedure is equally applicable after remand for further proceedings.[29]

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[26] *Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 429.

[27] Rule 15d, District Court Rules, September 1, 1938. Cf. Rule 34, Federal Equity Rules, 1912.

[28] *New York Security & Trust Co.* v. *Lincoln St. Ry. Co.,* 74 F. 67, 68; *Banks Law Pub. Co.* v. *Lawyers' Co-operative Pub. Co.,* 139 F. 701; *Kryptok Co.* v. *Haussmann & Co.,* 216 F. 267; *Milo Manor, Inc.* v. *Woodard,* 67 App. D. C. 296; 92 F. 2d 220, 223. Cf. *Clarke* v. *Boysen,* 264 F. 492, 496, a closed account cannot be reopened.

[29] Cf. 2 Daniell's Chancery Pleading and Practice, 6th Am. Ed., pp. 1536, n. 6, and 1537. For further action after decree, see *Mitchell Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247, 266; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 304, 314; *Rio Grande Dam Co.* v. *United States,* 215 U. S. 266, 274.

Other suggestions to support the respondent's position that § IX is invalid are made. It is said that it is vague, indefinite and obscure. These have been answered by what we have written. The issue of confiscation tendered by the answer of the utility to the petition to enforce the obligations of § IX need not be considered in this proceeding. If the utility has entered into a binding contract as to rates, their confiscatory character is not a defense to the claim of the city to service at the contract rates.[30]

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the decision of the Circuit Court of Appeals is right and that its judgment should be affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

PUBLIC SERVICE COMMISSION ET AL. *v.* BRASHEAR FREIGHT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 605. Decided February 13, 1939.

Under Judicial Code § 266, 28 U. S. C. 380, appeal directly to this Court from the District Court of three judges is limited to decrees granting or denying interlocutory or permanent injunctions; this Court has no jurisdiction of an appeal taken under this section by a defendant against whom an injunction was denied, for the purpose of reviewing the dismissal by the District Court of a counterclaim for money pleaded in the answer. P. 206.

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[30] Cf. *St. Cloud Public Service Co.* v. *St. Cloud,* 265 U. S. 352; *Henderson Water Co.* v. *Corporation Comm'n,* 269 U. S. 278; see *Southern Iowa Elec. Co.* v. *Chariton,* 255 U. S. 539, 542; *Paducah* v. *Paducah Ry. Co.,* 261 U. S. 267, 272–73; *Georgia Ry. & Power Co.* v. *Decatur,* 262 U. S. 432, 438–39; cf. *Columbus Ry., Power & L. Co.* v. *Columbus,* 249 U. S. 399, 410.

Messrs. James H. Linton and *Daniel C. Rogers* were on a brief for appellants.

No appearance for appellees.

PER CURIAM.

Appellees, Brashear Freight Lines, Inc., and others, common carriers of property for hire by motor vehicles operated in interstate commerce over the highways of Missouri and other States, brought this suit to restrain the enforcement of the statute of Missouri known as the Missouri Bus and Truck Act, effective September 15, 1931.

As an interlocutory injunction was sought, a temporary restraining order was issued and a court of three judges was convened pursuant to § 266 of the Judicial Code. 28 U. S. C. 380. It was later agreed "that the temporary restraining order should remain in effect until final decision on the merits of the relief asked in the plaintiffs' bill of complaint and that hearing on plaintiffs' application for a temporary and permanent injunction should be consolidated."

Defendants, Public Service Commission of Missouri and several state officers, in their answer included a counterclaim of the Public Service Commission seeking an accounting from plaintiffs for fees due to the State under the above mentioned Act for the use of the public highways during the time that the temporary restraining order was in effect. Upon stipulation, the restraining order was modified so as to provide for deposit of license fees with a trustee pending the termination of the litigation.

On hearing, the District Court entered its final decree as follows:

"1. That the plaintiffs are not entitled to a permanent injunction against the defendants;

"2. That the relief prayed for in plaintiffs' bill of complaint should be and is hereby in all respects denied, and

plaintiffs' bill of complaint is hereby dismissed on its merits;

"3. That the temporary restraining order heretofore granted to plaintiffs by this court against the defendants, be and the same hereby is dissolved;

"4. That the issue raised by the defendants' counterclaim, not having been urged nor presented by the parties, and the court being in doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised;

"5. That defendants recover their costs and disbursements herein, to be taxed as provided by law and inserted herein in the sum of ..... Dollars."

On motion for rehearing, paragraph 4 of the decree was modified by striking out the following words relating to the defendants' counterclaim, to wit, "not having been urged nor presented by the parties," and rehearing was denied.

The Public Service Commission brings this appeal seeking to review paragraph 4 of the decree, as amended, dismissing the counterclaim.

The appellate jurisdiction of this Court on direct appeal from a final decree by a District Court composed of three judges under § 266 of the Judicial Code is strictly limited as follows:

"a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The Public Service Commission as the successful party below has no standing to appeal from the decree denying the injunction. *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645; *Lindheimer* v. *Illinois Telephone Co.*, 292 U. S.

151, 176. And as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction.

Section 266 as originally enacted applied only to cases in which an interlocutory injunction was granted or denied and the purpose was to make interference by such an injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of three judges was likely to secure. *Cumberland Telephone Co.* v. *Public Service Comm'n*, 260 U. S. 212, 216; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 14. The amendment that the requirement of a court of three judges should also apply to the final hearing on the application for a permanent injunction was to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction. *Smith* v. *Wilson*, 273 U. S. 388, 390, 391; *Stratton* v. *St. Louis Southwestern Ry. Co.*, *supra*. And, as direct appeal to this Court was permitted from an order granting or denying an interlocutory injunction, the amendment provided also for such a direct appeal from a final decree granting or denying a permanent injunction.

It necessarily follows that, unless there is a proper appeal from a decree granting or denying an interlocutory or permanent injunction, the provision in § 266 for a direct appeal to this Court has no application. The appeal is

Dismissed.

INTERSTATE CIRCUIT, INC., ET AL. *v.* UNITED STATES.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 269. Argued January 11, 1939.—Decided February 13, 1939.

1. Where distributors of motion picture films, owning or controlling the copyrights and engaged, interstate, in the business of supplying the films to theaters for exhibition under license contracts, join in making and carrying out an agreement with the owners of the theaters in certain cities to whom their licenses for first run exhibitions of "feature" pictures in those cities are confined, whereby the distributors, in granting licenses to other theaters in the same places for subsequent runs of such films require of them that they observe a minimum price of admission and abstain from presenting a picture so licensed with any other feature picture at the same show,—the purpose and effect of these restrictions being to maintain the higher prices of the first run theaters and protect them from the competition of the others,—such agreement is an unreasonable restraint of interstate commerce and contrary to the Federal Anti-Trust Act. Pp. 221, 232.
2. The evidence in this case supported the inference that the distributors of the films acted in concert, in making their several agreements with the first run exhibitors, and in imposing the restrictions so stipulated on the subsequent-run exhibitors. P. 221.
3. Upon the production of such proof, the burden rested upon those implicated to explain away or contradict it. P. 225.
4. The production of weak evidence when strong is available leads to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character. P. 226.
5. Acceptance by competitors, knowing that concerted action is contemplated, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. P. 227.

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*Together with No. 270, *Paramount Pictures Distributing Co. et al.* v. *United States*, also on appeal from the District Court of the United States for the Northern District of Texas.

6. A contract between the copyright owner of motion picture films and the owner of motion picture theaters, restraining the competitive distribution of the films in the open market in order to protect the theater owner from competition of other theaters is not protected by the Copyright Act. P. 227.
7. The owner of those motion picture theaters in several cities in which the first runs of copyrighted "feature" pictures were exhibted, taking advantage of its monopoly, secured from each of several copyright owners who distributed such films in interstate commerce, an agreement binding the distributor when licensing subsequent runs of his films at other theaters in those cities to require the licensee to observe a certain minimum admission price and to abstain from exhibiting the picture in a double bill with any other "feature" film. The purpose of the arrangement was to protect the owner of the first-run theaters from competition of subsequent-run theaters, and its effect was to impose undue restraints upon competing theater businesses habitually exhibiting the competitive pictures of different copyright owners, and to enable the favored theater owner to dominate the business of his competitors. *Held:* That the contracts were not protected by the Copyright Act, and that, aside from any agreement between the distributors themselves, they were contrary to the Anti-Trust Act. P. 230.

20 F. Supp. 868, affirmed.

APPEALS from a decree of the District Court awarding an injunction in a suit brought by the Government under the Sherman Anti-Trust Act.

Messrs. George S. Wright and *Thomas D. Thacher,* with whom *Mr. Richard H. Demuth* was on the brief, for appellants.

A licensee of the first run exhibition of a copyrighted motion picture photoplay has the legal right to obtain from the licensor a covenant that the right shall not be impaired by a subsequent exhibition of the photoplay at an admission price of less than 25¢ or as part of a double feature program.

A distributor, the owner of a copyrighted motion picture photoplay, acting independently of any other distributor, has the legal right to agree with a first run

exhibitor to include either or both of the restrictions here in question in subsequent run license agreements. *Metro-Goldwyn-Mayer D. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70; *Manners* v. *Morosco*, 252 U. S. 317; *Bement* v. *National Harrow Co.*, 180 U. S. 70; *United States* v. *General Electric Co.*, 272 U. S. 476; *Carbice Corporation* v. *American Patents Development Corp.*, 283 U. S. 27; *Standard Oil Co.* v. *United States*, 283 U. S. 163; *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U. S. 124.

The right of the owner of a patent or a copyright is to exclude all from exercising his exclusive rights, and he may select his licensees at will, preferring the large or the small business units and granting his monopoly to one or more as he wishes, and for his own reasons, which no doubt under ordinary circumstances will be dictated by his desire for profit in the form of royalties. *American Equipment Co.* v. *Tuthill*, 69 F. 2d 406. He may impose any conditions reasonably adapted to the realization of the value of his monopoly, as, for instance, by fixing the price at which the licensee may sell unpatented articles manufactured under license by patented machinery (*Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 F. 2d 245; *Murphy* v. *Christian Press Assn. Pub. Co.*, 38 App. Div. 426), and by dictating the customers to whom articles may be sold by the licensee. *Becton, Dickinson & Co.* v. *Eisele & Co.*, 86 F. 2d 267. He may also license the public performance of copyrighted works to some licensees on more favorable terms than to others. *Buck* v. *Hillsgrove Country Club*, 17 F. Supp. 643. He is not required to give reasons or deal fairly with those seeking to share in his monopoly. *Victor Talking Mach. Co.* v. *The Fair*, 123 Fed. 424; *Dr. Miles Medical Co.* v. *Platt*, 142 Fed. 606.

Of course, the protection of the Copyright Act does not extend to unreasonable restraints of trade imposed pur-

suant to a combination, agreement or conspiracy between two or more copyright owners who have combined for the purpose of monopoly or restraint of trade. *Straus* v. *American Publishers' Assn.,* 231 U. S. 222; *Paramount Famous Corp.* v. *United States,* 282 U. S. 30. But in the absence of such prior agreement, combination or conspiracy, the owner of the copyright has an absolute monopoly within the field of his copyright.

The specific contracts involved in the case at bar were considered and upheld by the appellate court of Texas in *Glass* v. *Hoblitzelle,* 83 S. W. 2d 796. The principles applied are settled law in Texas with regard to purely intrastate transactions. *Coca-Cola Co.* v. *State,* 225 S. W. 791. See *Shubert Theatre Players Co.* v. *Metro-Goldwyn-Mayer Distributing Corp.,* unreported, Jan. 30, 1936 (D. Minn.).

Even if there had been no copyright, the agreements with individual distributors would still be valid. A contract containing a covenant in restraint of trade is nonetheless valid if the restraint is reasonably necessary for the protection of the right granted by the contract. *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179; *Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 67; *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271; *Allison* v. *Seigle,* 79 F. 2d 170; *A. Booth & Co.* v. *Davis,* 127 F. 875.

See *Fowl* v. *Park,* 131 U. S. 88; *Oregon Steam Navigation Co.* v. *Winsor, supra; Moore* v. *New York Cotton Exchange,* 270 U. S. 593; *United States* v. *General Electric Co.,* 272 U. S. 476; *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, 250, 252.

The protection given by the law to the copyright owner is still greater. Apart from agreements to impose restraints unrelated to the reward of the statutory monopoly, or to monopolize trade in articles not covered by the statutory monopoly, a copyright proprietor in granting an exhibition right may bind and restrain himself by any

covenant which has reasonable relation to the reward of the copyright or the protection of the granted right even though such covenants directly restrain interstate commerce. The Sherman Anti-Trust Act has no application to such restraints, which under all the authorities are within the statutory monopoly of the copyright.

The decree must be reversed in so far as it enjoins separate agreements between each of the exhibitor defendants and each of the distributor defendants, not acting in concert with any other distributors, to impose restrictions necessary for the protection of their mutual interests in the copyright reward.

The court's inference that the distributor defendants agreed and conspired among themselves to take uniform action on the proposals made by Interstate Circuit, and to impose the restrictions requested by Interstate, is unsupported by the preceding findings upon which it is expressly predicated, and is contrary to the stipulated facts and the undisputed evidence.

In order to make out unlawful conspiracy something more than mere uniformity of action must be shown. *Frey & Son* v. *Cudahy Packing Co.,* 256 U. S. 208. To warrant the injunction invalidating such transactions, there must be a "definite factual showing of illegality," *i. e.,* a clear purpose to monopolize or restrain trade. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 179. From the plurality and similarity of such lawful acts unlawful combination may not be inferred. *Terminal Warehouse* v. *Pennsylvania R. Co.,* 297 U. S. 500, 516.

If one would infer conspiracy from similarity of lawful acts there must be accuracy in statement of the facts upon which the inference is predicated, and if the inference is inconsistent with any of the facts established by agreement of the parties it must be rejected. *Hackfeld & Co.* v. *United States,* 197 U. S. 442; *Kings County*

Lighting Co. v. *Nixon,* 268 Fed. 143, 149, affirmed, 258 U. S. 180.

The burden upon a plaintiff to prove his case by substantive evidence can not be met by failure of the defendant to call witnesses. As this Court stated in the case of *Northern Ry. Co.* v. *Page,* 274 U. S. 65, 74, the failure of the defendant to call a witness can not be "taken as substantive evidence of any fact." See also *Mammoth Oil Co.* v. *United States,* 275 U. S. 13, 52.

The restrictions in question do not unreasonably restrain trade or commerce. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 359; *Nash* v. *United States,* 229 U. S. 373, 376; *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

Solicitor General Jackson, with whom *Assistant Attorney General Arnold* and *Mr. Charles H. Weston* were on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal under § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345, from a final decree of the District Court for northern Texas restraining appellants from continuing in a combination and conspiracy condemned by the court as a violation of § 1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. § 1, and from enforcing or renewing certain contracts found by the court to have been entered into in pursuance of the conspiracy. 20 F. Supp. 868. Upon a previous appeal this Court set aside the decree and remanded the cause to the District Court for further proceedings because of its failure to state findings of fact and conclusions of law as required by Equity Rule 70½. 304 U. S. 55. The case is

now before us on findings of the District Court specifically stating that appellants did in fact agree with each other to enter into and carry out the contracts, which the court found to result in unreasonable and therefore unlawful restraints of interstate commerce.

Appellants comprise the two groups of defendants in the District Court. The members of one group of eight corporations which are distributors of motion picture films, and the Texas agents of two of them, are appellants in No. 270. The other group, corporations and individuals engaged in exhibiting motion pictures in Texas, and some of them in New Mexico, appeals in No. 269. The distributor appellants are engaged in the business of distributing in interstate commerce motion picture films, copyrights on which they own or control, for exhibition in theatres throughout the United States. They distribute about 75 per cent. of all first-class feature films exhibited in the United States. They solicit from motion picture theatre owners and managers in Texas and other states applications for licenses to exhibit films, and forward the applications, when received from such exhibitors, to their respective New York offices, where they are accepted or rejected. If the applications are accepted, the distributors ship the films from points outside the states of exhibition to their exchanges within those states, from which, pursuant to the license agreements, the films are delivered to the local theatres for exhibition. After exhibition the films are reshipped to the distributors at points outside the state.

The exhibitor group of appellants consists of Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., and Hoblitzelle and O'Donnell, who are respectively president and general manager of both and in active charge of their business operations. The two corporations are affiliated with each other and with Paramount Pictures Distributing Co., Inc., one of the distributor appellants.

Interstate operates forty-three first-run and second-run motion picture theatres, located in six Texas cities.[1] It has a complete monopoly of first-run theatres in these cities, except for one in Houston operated by one distributor's Texas agent. In most of these theatres the admission price for adults for the better seats at night is 40 cents or more. Interstate also operates several subsequent-run theatres in each of these cities, twenty-two in all, but in all but Galveston there are other subsequent-run theatres which compete with both its first- and subsequent-run theatres in those cities.

Texas Consolidated operates sixty-six theatres, some first- and some subsequent-run houses, in various cities and towns in the Rio Grande Valley and elsewhere in Texas and in New Mexico. In some of these cities there are no competing theatres, and in six leading cities there are no competing first-run theatres. It has no theatres in the six Texas cities in which Interstate operates. That Interstate and Texas Consolidated dominate the motion picture business in the cities where their theatres are located is indicated by the fact that at the time of the contracts in question Interstate and Consolidated each contributed more than 74 per cent. of all the license fees paid by the motion picture theatres in their respective territories to the distributor appellants.[2]

On July 11, 1934, following a previous communication on the subject to the eight branch managers of the dis-

[1] A first-run theatre is one in which a picture is first exhibited in any given locality. A subsequent-run theatre is one in which there is a subsequent exhibition of the same picture in the same locality.

[2] Payments of license fees by Interstate to distributor appellants in the 1934–35 season aggregated $1,077,819.58. Payments by all other exhibitors operating theatres in the same cities aggregated $369,594.72. Texas Consolidated payments for the same period aggregated $594,-863.68. All other exhibitors operating in the same cities paid $47,928.22.

tributor appellants, O'Donnell, the manager of Interstate and Consolidated, sent to each of them a letter [3] on the letterhead of Interstate, each letter naming all of them as addressees, in which he asked compliance with two demands as a condition of Interstate's continued exhibition of the distributors' films in its 'A' or first-run the-

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[3] The letter follows:

"INTERSTATE CIRCUIT, INC.,
MAJESTIC THEATRE BUILDING,
Dallas, Texas, July 11, 1934.

Messrs.: J. B. Dugger, Herbert MacIntyre, Sol Sachs, C. E. Hilgers, Leroy Bickel, J. B. Underwood, E. S. Olsmyth, Doak Roberts.

GENTLEMEN: On April 25th, the writer notified you that in purchasing product for the coming season 34–35, it would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to purchase produce to be exhibited in its 'A' theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on 'A' pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double-features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of

atres at a night admission of 40 cents or more.[4] One demand was that the distributors "agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening." The other was that "on 'A' pictures which are exhibited at a night admission of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double features." The letter added that with respect to the "Rio Grande Valley situation," with which Consolidated alone was concerned, "We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢."

The admission price customarily charged for preferred seats at night in independently operated subsequent-run theatres in Texas at the time of these letters was less than 25 cents. In seventeen of the eighteen independent theatres of this kind whose operations were described by witnesses the admission price was less than 25 cents. In one only was it 25 cents. In most of them the admission was 15 cents or less. It was also the general prac-

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35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.

The writer will appreciate your acknowledging your complete understanding of this letter.

Sincerely, (Signed) R. J. O'Donnell."

[4] A Class 'A' picture is a "feature picture" having five reels or more of film each approximately 1,000 feet in length, shown in theatres of the specified Texas cities charging 40 cents or more for adult admission at night. Approximately fifty per cent. of the pictures released by the distributor defendants in Texas cities in 1934–1935 were Class 'A' pictures.

tice in those theatres to provide double bills either on certain days of the week or with any feature picture which was weak in drawing power. The distributor appellants had generally provided in their license contracts for a minimum admission price of 10 or 15 cents, and three of them had included provisions restricting double-billing. But none was at any time previously subject to contractual compulsion to continue the restrictions. The trial court found that the proposed restrictions constituted an important departure from prior practice.

The local representatives of the distributors, having no authority to enter into the proposed agreements, communicated the proposal to their home offices. Conferences followed between Hoblitzelle and O'Donnell, acting for Interstate and Consolidated, and the representatives of the various distributors. In these conferences each distributor was represented by its local branch manager and by one or more superior officials from outside the state of Texas. In the course of them each distributor agreed with Interstate for the 1934–35 season to impose both the demanded restrictions upon their subsequent-run licensees in the six Texas cities served by Interstate, except Austin and Galveston. While only two of the distributors incorporated the agreement to impose the restrictions in their license contracts with Interstate, the evidence establishes, and it is not denied, that all joined in the agreement, four of them after some delay in negotiating terms other than the restrictions and not now material. These agreements for the restrictions—with the immaterial exceptions noted [5]—were carried into effect by each of the distribu-

[5] The Metro-Goldwyn-Mayer Distributing Corporation agreement with Interstate did not include Houston, where it operated through a subsidiary a first-run theatre, and where it did not until the 1936–1937 season license any subsequent-run pictures. It agreed with Interstate to impose the restrictions in Houston for the 1936–1937 season.

tors' imposing them on their subsequent-run licensees in the four Texas cities during the 1934–35 season. One agreement, that of Metro-Goldwyn-Mayer Distributing Corporation, was for three years. The others were renewed in the two following seasons and all were in force when the present suit was begun.

None of the distributors yielded to the demand that subsequent runs in towns in the Rio Grande Valley served by Consolidated should be restricted. One distributor, Paramount, which was affiliated with Consolidated, agreed to impose the restrictions in certain other Texas and New Mexico cities.

The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate to impose the demanded restrictions upon all subsequent-run exhibitors in Dallas, Fort Worth, Houston and San Antonio; that they carried out the agreement by imposing the restrictions upon their subsquent-run licensees in those cities, causing some of them to increase their admission price to 25 cents, either generally or when restricted pictures were shown, and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures; that the effect of the restrictions upon "low-income members of the community" patronizing the theatres of these exhibitors was to withhold from them altogether the "best entertainment furnished by the motion picture industry"; and that the restrictions operated to increase the income of the distributors and of Interstate and to deflect attendance from later-run exhibitors who yielded to the restrictions to the first-run theatres of Interstate.

The court concluded as matters of law that the agreement of the distributors with each other and those with Interstate to impose the restrictions upon subsequent-run exhibitors and the carrying of the agreements into effect, with the aid and participation of Hoblitzelle and O'Donnell, constituted a combination and conspiracy in restraint of interstate commerce in violation of the Sherman Act. It also concluded that each separate agreement between Interstate and a distributor that Interstate should subject itself to the restrictions in its subsequent-run theatres and that the distributors should impose the restrictions on all subsequent-run theatres in the Texas cities as a condition of supplying them with its feature pictures, was likewise a violation of the Act.

It accordingly enjoined the conspiracy and restrained the distributors from enforcing the restrictions in their license agreements with subsequent-run exhibitors [6] and from enforcing the contracts or any of them. This included both the contracts of Interstate with the distributors and the contract between Consolidated and Paramount, whereby the latter agreed to impose the restrictions upon subsequent-run theatres in Texas and New Mexico served by it.

Appellants assail the decree of the District Court upon three principal grounds: (a) that the finding of agreement and conspiracy among the distributor appellants to impose the restrictions upon later-run exhibitors is not supported by the court's subsidiary findings or by the evidence; (b) that the several separate contracts entered into by Interstate with the distributors are within the protection of the Copyright Act and consequently

[6] The injunction against the double feature restriction excepted from its operation two distributors, and the agent of one of them, which had previously made a practice of including such a restriction in their license agreements.

are not violations of the Sherman Act; and (c) that the restrictions do not unreasonably restrain interstate commerce within the provisions of the Sherman Act.

The Agreement Among the Distributors.

Although the films were copyrighted, appellants do not deny that the conspiracy charge is established if the distributors agreed among themselves to impose the restrictions upon subsequent-run exhibitors. *Straus* v. *American Publishers' Assn.,* 231 U. S. 222; *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30. As is usual in cases of alleged unlawful agreements to restrain commerce, the Government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.

The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; and from the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with Interstate or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors. This conclusion is challenged by appellants because not supported by subsidiary findings or by the evidence. We think this inference of the trial court was rightly drawn from the evidence. In the view we take of the legal effect of the coöperative action of the distributor appellants in carrying into effect the restrictions imposed upon subsequent-run theatres in the four Texas cities and of the legal effect of the separate agreements for the imposi-

tion of those restrictions entered into between Interstate and each of the distributors, it is unnecessary to discuss in great detail the evidence concerning this aspect of the case.

The O'Donnell letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all in a single document.

There was risk, too, that without agreement diversity of action would follow. Compliance with the proposals involved a radical departure from the previous business practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres. Acceptance of the proposals was discouraged by at least three of the distributors' local managers. Independent exhibitors met and organized a futile protest which they presented to the representatives of Interstate and Consolidated. While as a result of independent negotiations either of the two restrictions without the other could have been put into effect by any one or more of the distributors and in any one or more of the Texas cities served by Interstate, the negotiations which ensued and which in fact did result in modifications of the proposals resulted in substantially unanimous action of the distributors, both as to the terms of the restrictions and in the selection of the four cities where they were to operate.

One distributor, it is true, did not agree to impose the restrictions in Houston, but this was evidently because it did not grant licenses to any subsequent-run exhibitor in that city, where its own affiliate operated a first-run theatre.[7] The proposal was unanimously rejected as to Galveston and Austin, as was the request that the restrictions should be extended to the cities of the Rio Grande Valley served by Consolidated. We may infer that Galveston was omitted because in that city there were no subsequent-run theatres in competition with Interstate. But we are unable to find in the record any persuasive explanation, other than agreed concert of action, of the singular unanimity of action on the part of the distributors by which the proposals were carried into effect as written in four Texas cities but not in a fifth or in the Rio Grande Valley. Numerous variations in the form of the provisions in the distributors' license agreements and the fact that in later years two of them extended the restrictions into all six cities, do not weaken the significance or force of the nature of the response to the proposals made by all the distributor appellants. It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.

Appellants present an elaborate argument, based on the minutiae of the evidence, that other inferences are to be drawn which explain, at least in some respects, the unanimity of action both in accepting the restrictions for some territories and rejecting them for others. It is said that the rejection of Consolidated's proposal for the

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[7] See footnote 5.

Rio Grande Valley may have been due to the fact that the demand with respect to that territory differed materially from that directed to the six Texas cities. It is urged that the proposal for the Valley was that all pictures once shown in a first-run theatre with a 35 cents admission should not thereafter be exhibited in any city in the Valley for less than 25 cents admission, while the demand in behalf of Interstate with respect to the six Texas cities was that 'A' pictures, after a first-run in theatres charging 40 cents admission or more, should not thereafter be exhibited in the same city for less than 25 cents admission. But reference to the O'Donnell letter shows that both demands related to pictures shown in a first-run or 'A' theatre and were not in terms limited to subsequent-run exhibitions in the same city in which the first run had occurred. The record discloses no reason for the distinction taken between first-run theatres in the six cities charging an admission of 40 cents or more and those in the Valley served by Consolidated charging 35 cents, other than the fact that the cities there were smaller.

The trial court, interpreting the letter in the light of the whole evidence, which showed unmistakably that one purpose of both demands was to protect first-run houses from competition of subsequent-run houses, concluded that the substance of the proposals in one case as in the other was that the restrictions upon the subsequent-run theatres were to be imposed only in the same city in which the first run had occurred. We agree with its conclusion, but in any event since the demand made by Interstate was phrased as broadly as that made by Texas Consolidated, both as to the kind of pictures affected and the scope of the restriction, we can find no basis for saying that one was more limited in its essentials than the other, or that any explanation is thus afforded of the unanimous acceptance of the demands of Interstate in

four of the six cities affected by the proposal, and the unanimous rejection of the demand of Consolidated. In the face of this action and similar unanimity with respect to other features of the proposals, and the strong motive for such unanimity of action, we decline to speculate whether there may have been other and more legitimate reasons for such action not disclosed by the record, but which, if they existed, were known to appellants.

The failure of the distributors to make any substantial changes in their business practices in dealing with exhibitors in Austin for the season 1934–35; their failure to unite in imposing the restriction as to admission prices in subsequent-run theatres in that city; and their failure to enter into the proposed restrictive agreement with Interstate for Austin, are likewise unexplained by any inferences to be drawn from the record. The facts that three of the distributors continued their established practice there, as elsewhere, of placing restrictions against double-billing in their license contracts; that the 25 cents admission restriction appeared in the Austin license agreements of one distributor for that year; and that certain of the distributors included the restrictions in their Austin license agreements in later years, do not militate against this conclusion. Taken together, the circumstances of the case which we have mentioned, when uncontradicted and with no more explanation than the record affords, justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions upon their licensees in the four Texas cities.

This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the

burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton* v. *United States,* 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle* v. *Burnham,* 153 U. S. 216, 225; *Kirby* v. *Tallmadge,* 160 U. S. 379, 383; *Bilokumsky* v. *Tod,* 263 U. S. 149, 153, 154; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 111, 112; *Mammoth Oil Co.* v. *United States,* 275 U. S. 13, 52; *Local 167* v. *United States,* 291 U. S. 293, 298.

While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that coöperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sher-

man Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck* v. *United States,* 253 F. 212, 213, aff'd, 249 U. S. 47; *Levey* v. *United States,* 92 F. 2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Lawlor* v. *Loewe,* 235 U. S. 522, 534; *American Column Co.* v. *United States,* 257 U. S. 377; *United States* v. *American Linseed Oil Co.,* 262 U. S. 371.

The Protection Afforded by the Copyright Act to the Contracts between Interstate and the Distributors.

The decree below enjoined enforcement and renewal of the separate agreements between each distributor and Interstate and of the contract between Paramount and Consolidated imposing the restrictions upon later-run theatres in certain cities in Texas and New Mexico, although the court found no conspiracy among the distributors to effect this latter restriction. Appellants assail this part of the decree on the ground that such separate agreements, if entered into without agreement or concert among the distributors, are a legitimate exercise of the monopoly secured to the distributors by their copyrights.

Under § 1 of the Copyright Act, 35 Stat. 1075, 17 U. S. C. § 1, the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it.

See *Manners* v. *Morosco,* 252 U. S. 317. Appellants argue that the distributors were free to license the films for exhibition subject to the restrictions, just as a patentee in a license to manufacture and sell the patented article may fix the price at which the licensee may sell it. *Bement* v. *National Harrow Co.,* 186 U. S. 70; *United States* v. *General Electric Co.,* 272 U. S. 476. That the parallel is not complete is obvious. Because a patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which shall be paid for an entertainment which includes features other than the particular picture licensed. Cf. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502; *Carbice Corporation* v. *American Patents Development Corp.,* 283 U. S. 27; *Leitch Manufacturing Co.* v. *Barber Co.,* 302 U. S. 458.

We have no occasion now to pass upon these or related questions. Granted that each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees, we are nevertheless of the opinion that they were not free to use their copyrights as implements for restraining commerce in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. The restrictions imposed upon Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them. They gave effect to the will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor. Interstate was able to acquire the control and impose its will by force of its monopoly of first-run theatres in the principal cities of Texas and the threat to use its monopoly position against copyright owners who did not yield to its demands. The purpose

and ultimate effect of each of its contracts with the distributors was to restrain its competitors in the theatre business by forcing an increase in their admission price and compelling them through the double feature restriction to make their entertainment less attractive, and to preclude the distributors for the specified time from relaxing the pressure of the restrictions upon them.

The case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and a subsequent showing of the same film by a licensee of the copyright owner. The contract, when applied to the situation existing in the four Texas cities, had a more extensive effect. Both Interstate's first-run and second-run theatres in each of the cities regularly compete with the independent second-run theatres in those cities. Since all are in practically continuous operation during the season, competition between them extends to the exhibition of films furnished by different distributors including those of copyright owners shown by independents, which compete with those of other copyright owners shown at the same time by Interstate. Moreover, the provision in Interstate's contracts for the restriction against double billing stipulated for restraint upon competition with Interstate in the exhibition of films in the double bill in which neither Interstate nor the licensor had any interest by way of copyright or otherwise. The patent effect of the contract was to impose an undue restraint both as to admission price and the character of the exhibition upon competing theatre businesses habitually exhibiting the competitive pictures of different copyright owners. Through acceptance of its terms by the principal distributors the contract became the ready instrument by which Interstate succeeded in dominating the business of its competitors in the Texas cities. The fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but

did not, does not alter the character of the contract as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce. Even if it be assumed that the benefit to the distributor from the restrictions is one which it might have secured through its monopoly control of the copyright alone, that would not extend the protection of the copyright to the contract with Interstate and to the resulting restraint upon the competition of its business rivals.

A contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between two copyright owners or patentees. *Straus* v. *American Publishers' Assn., supra; Paramount Famous Lasky Corp.* v. *United States, supra;* see *Standard Oil Co.* v. *United States,* 283 U. S. 163, 174. In either case if the contract is effective, as it was here, competition is suppressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20.

Unreasonableness of the Restraint.

The restrictions imposed on the subsequent-run exhibitors were harsh and arbitrary. As we have seen, they were forced upon the distributors and upon their customers as a result of the agreements entered into by Interstate with the distributors. Compliance with the restrictions were a uniform condition of exhibition of the films by subsequent-run theatres. There were wide differences in the location and character of the subsequent-

run houses in the four Texas cities, which afforded basis for the corresponding differences in admission prices charged before the restrictions were adopted. Due to the practice of the distributors of establishing clearance periods between the first and each successive run, later runs are progressively less attractive. The poorer class of theatres, exhibiting the later runs, sometimes offered a double bill as an offsetting inducement for patronage. Despite these differences which normally affect the admission price that could be charged by subsequent-run theatres, the 25 cents admission price was to be required of all alike, forcing increases in admission price ranging from 25 per cent. to 150 per cent.

The trial court found that practically all of the later-run exhibitors who bowed to the restrictions would not have done so but for the compulsion of their need of showing the restricted pictures, and that the result was to increase the income of the distributors and Interstate and diminish that of the exhibitors who accepted the restrictions, by deflecting attendance from subsequent-run theatres to Interstate's first-run theatres. There was no testimony that such loss was offset by the higher admission price of the second-run theatres, and there was evidence that some of the poorer class of second-run theatres suffered loss of income by yielding to the restrictions. Some who did not yield were compelled to forego exhibition of the distributors' feature pictures. The effect was a drastic suppression of competition and an oppressive price maintenance, of benefit to Interstate and the distributors but injurious alike to Interstate's subsequent-run competitors and to the public.

The benefit, at such a cost, does not justify the restraint. *Eastern States Lumber Assn.* v. *United States, supra,* 613; *Duplex Co.* v. *Deering,* 254 U. S. 443, 468; *Anderson* v. *Shipowners Association,* 272 U. S. 359, 363; *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.,* 274 U. S. 37, 47.

It does not appear that the competition at which they were aimed was unfair or abnormal. Cf. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 363, 372. The consequence of the price restriction, though more oppressive, is comparable with the effect of resale price maintenance agreements, which have been held to be unreasonable restraints in violation of the Sherman Act. *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373; *United States* v. *Schrader's Son, Inc.,* 252 U. S. 85. Cf. *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 397, *et seq.*

We think the conclusion is unavoidable that the conspiracy and each contract between Interstate and the distributors by which those consequences were effected are violations of the Sherman Act and that the District Court rightly enjoined enforcement and renewal of these agreements, as well as of the conspiracy among the distributors.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE ROBERTS, dissenting.

I think the decree should be reversed. The bill charges that the two exhibitor defendants which were under the same management, knowing that subsequent run houses in Dallas, Houston, San Antonio, Fort Worth, Austin, and Galveston, the largest cities in Texas, and in Waco, Wichita Falls, Tyler, Amarillo, Texas, and Albuquerque, New Mexico, could not operate without the showing of feature films, in order to strengthen these two defendants' monopoly in first run exhibition of such feature films, and to monopolize the business of exhibiting feature films in second or subsequent run houses operated by them in those cities, conspired to notify the distributor defendants that, during the 1934-1935 season, and subsequent seasons, the latter must advise second and subsequent run

exhibitors that such feature films could not be operated in second or subsequent run houses for less than twenty-five cents adult lower floor admission or as part of a double feature program and that, unless the distributor defendants would do so, the exhibitors would not maintain a night adult admission price of forty cents or more for the first run exhibitions of feature films licensed by the distributor defendants to them. The bill charged that, upon receipt of advices to this effect from the exhibitor defendants, the distributor defendants joined in the unlawful combination and conspired with the exhibitor defendants to place such restrictions in licenses to second or subsequent run exhibitors.

The parties entered into a stipulation of facts, in lieu of evidence, binding upon them for the purposes of suit, and further agreed that any party might introduce additional relevant and material evidence bearing upon the issues "but not inconsistent with any fact contained in" the stipulation. Plaintiff and defendants introduced additional evidence. The testimony of second or subsequent exhibitors called as witnesses by plaintiff and defendants may be said to have been, in some respects, conflicting. The evidence offered by the plaintiff and the defendants with respect to the negotiations between the exhibitor defendants and the distributor defendants, and the conduct of the latter, was uncontradicted upon all points material to a resolution of the fact issues in the cause.

The District Court made ten findings (numbered from 12 to 21, inclusive) of subsidiary or evidentiary facts and based upon these specific findings one conclusion of ultimate fact,—that the distributor defendants conspired amongst themselves to take uniform action upon the proposals of Interstate and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston, and San Antonio.

The appellants contend, and I think their contention is sound, that the subsidiary findings are insufficient to support the fact conclusion and that these subsidiary findings are, in a number of vital instances, contrary to, or unsupported by, the agreed statement of facts and, in other instances, are in the teeth of uncontradicted and unimpeached testimony.

Since this is a direct appeal from the District Court in an equity suit, and the findings are challenged, this court is bound to review them and to determine whether they have a proper basis in the evidence. I think such a review demonstrates the lack of support of the critical basic findings. No good purpose would be served by a detailed analysis of what I consider erroneous and unsupported findings. But I am of opinion that the findings ought not to stand and that the conclusion that there was a conspiracy, either between the distributor defendants or between them and the Interstate corporation, is unjustified. The opinion of this Court accepts and closely follows these findings of fact but, while approving the conclusion of the District Court, finds it unnecessary to give detailed consideration to the appellants' challenge of the accuracy and sufficiency of the subsidiary findings, for the reason that it holds, as matter of law, on uncontradicted facts, that there were eight separate conspiracies unreasonably to restrain trade in interstate commerce in virtue of the agreement of each of the distributor defendants with Interstate to impose restrictions on subsequent run exhibitors in certain cities.

Separately considered, I think these agreements are not conspiracies contemplated by the Sherman Act and the holding that they are goes far beyond anything this Court has ever decided. The distributor defendants are owners of copyrights on moving picture films. The copyright law gives them the exclusive privilege of licensing performances of the photoplays recorded. On the other

hand, there are competing concerns whose copyrighted feature films are licensed for the purpose of production. In addition, there are copyrighted films of lower classes well known to the trade. These lower class films are usually licensed to houses that charge lower prices for first run exhibition than those charged by theatres showing feature films, and both the feature films, second and subsequent run, and other films of less attraction and less expensively produced, are exhibited by so-called second run houses. The latter pay a much reduced rate to obtain the feature films for exhibition in the same city after their original showing as feature films in first run houses. Many of the subsequent run houses charge low admission prices, and sometimes put on double bills.

Interstate is the largest licensee of first run feature films in Texas. It has many more first run houses than any other Texas exhibitor. Its first run houses are in the largest cities where the highest admission prices can be obtained. The distributors are, of course, interested in the conservation and protection of the necessarily high license fees which they must obtain for first runs of feature pictures. These are far higher than those received for the second showings of the same pictures in the same city. They naturally have to protect themselves and their licensees from the destruction of the good will and drawing power of these feature films in their first runs. In an effort to accomplish this, by requiring minimum admission charges and prohibiting double billing in subsequent runs of feature pictures, they may, of course, narrow the opportunity of second run houses to obtain feature pictures.

I agree that while the Copyright Act gives a distributor a so-called monopoly, that monopoly cannot be made the cover for a conspiracy to restrain trade or commerce.[1]

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[1] *Straus* v. *American Publishers' Assn.*, 231 U. S. 222; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30.

But I think it obscures the issue to use the phrase "monopoly." What the copyright gives is much the same as what is conferred by the patent law.[2] The exhibition of a photoplay, were it not for the copyright law, would amount to a public disclosure and the use of the material would thereafter be open to the public. All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property; another is the right to sell the production with consequent exclusive enjoyment in the vendee; another is the right to license others to use the product as one might lease or bail real or personal property. The monopoly, so called, amounts to no more than the attachment to the work of an author or composer or producer of motion pictures of the same rights as inhere in other property under the common law. Therefore, the standing of the distributor defendants toward their customers, as respects the productions proposed to be licensed, differs in no way from that of the owner of any other property toward those to whom he leases or licenses its use or sale.

The decision of the court necessarily means that the owner of a product may not agree with an important customer that the former will not sell the product at a cut rate to the latter's competitors in the same city in which he conducts his business. The decision leads to the necessary conclusion that a manufacturer whose skill results in the production of apparatus of superior quality may not, in consideration of a price to be paid him for the bailment of that apparatus to certain users in a city, contract, as an inducement to the users, that he will not bail the same apparatus at lower and destruc-

[2] See *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186.

tive prices to his bailees' competitors in the same city. I think it has never been suggested that an agreement of the sort mentioned, restricted in time and place, amounts to a conspiracy in unreasonable restraint of trade or commerce. The right to make such agreements is essential to the realization of the full value of the property. It is conceded that the distributor defendants might grant exclusive licenses to Interstate, and that an exclusive license to Interstate would not constitute a conspiracy under the Sherman Act, or confer any cause of action on others who desired licenses in the same city; and this remains true however much such action by the licensor might injure the business of others seeking licenses.

I am of opinion that the restrictions in the licenses of second run exhibitors were not unreasonable restraints of commerce under the Sherman Act. There is no contention that the action of the distributor defendants discouraged competition between them either for the business of Interstate or for that of subsequent run licensees. The restrictions upon the latter were not intended to increase license fees paid by them or those paid by Interstate; they were imposed to prevent destruction of the good will which made possible the continued exhibition of first run feature pictures and to avoid decrease of the revenue from those pictures then and theretofore enjoyed under licenses to Interstate and other first run feature exhibitors. The reasonableness of the restrictions must be judged by the situation of the industry and the propriety of its protection from practices which would seriously injure it.[3] The question always is whether an agreement unduly restrains competition and, in applying

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[3] *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 358, 359, 360, 362. Compare *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

this test, consideration must be given both to the intent and effect of the agreement in the light of realities.

It is settled that the proprietor of a copyright may grant an exclusive license; that is, may covenant with his licensee that he will not license anyone else, as the owner of a patent may grant a similar exclusive license to make or sell the patented article.[4] It is settled that the distributor defendants could lawfully stipulate with their licensees, whether first run or subsequent run, as to the admission price to be paid by patrons and that, so to do, would not be a violation of the Sherman Act.[5] But it is said that if, in order to protect its earnings from first run licenses by enabling its licensees to pay the demanded consideration, the distributor agrees to restrict in anywise the exhibition of the same feature by a subsequent run exhibitor he has violated the Anti-Trust Law. In the nature of things this cannot be true. The record discloses that the distributors have always provided a so-called "clearance" between the first run and subsequent runs of feature pictures. By this is meant that the distributors refuse to license a subsequent run theatre to show such a feature until the expiration of a given number of days or months after the picture has been shown in a first run house. This is a perfectly natural procedure and one obviously required to protect the value of the first run license. Under the decision here, however, if a distributor should agree with a first run house that if it will contract for a given feature picture at a given price the distributor will impose a clearance on second run houses this would be a conspiracy in restraint of trade. Other restrictions tending to preserve the value of the

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[4] *Manners* v. *Morosco*, 252 U. S. 317; *Bement* v. *National Harrow Co.*, 186 U. S. 70.

[5] *United States* v. *General Electric Co.*, 272 U. S. 476, 488–490; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 179.

first exhibition of a feature picture such as those challenged in this case are just as necessary and, I suppose, in the absence of agreement would be held just as lawful as the restriction known as a clearance.

The opinion of the Court recognizes that a distributor may lawfully agree that its exhibitor licensee shall have the exclusive right to exhibit a copyrighted play but condemns the agreements here in controversy although a much less drastic restraint respecting licenses to subsequent run exhibitors results from the provision for licenses with a restriction as to price and as to double billing.

Once the property rights conferred by the Copyright Law are recognized it must follow that the principles governing the right to use, sell, or turn to account other forms of property are equally applicable here. We have often held that a contract containing a covenant in restraint of trade is valid if the restraint is reasonably necessary for the protection of the right granted by the owner of the property. Examples of such lawful contracts are those by which the vendor of a business sold as a going concern agrees that for the protection of its value he will for a period of years refrain from engaging in the same business in a prescribed territory; [6] and those by the vendor with the vendee of an article to be used in business or trade that it shall not be used so as to interfere with the vendor's business; [7] which are held not to offend the Sherman Act if the prohibition has a reasonable relation to the value of the business of the vendor.

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[6] *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179; *Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 64, 67.

[7] *Fowle* v. *Park,* 131 U. S. 88; *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, 250, 252; *Moore* v. *New York Cotton Exchange,* 270 U. S. 593; *United States* v. *General Electric Co.,* 272 U. S. 476; *United States* v. *Addyston Steel Co.,* 85 F. 271.

The Government stresses the fact that each of the distributors must have acted with knowledge that some or all of the others would grant or had granted Interstate's demand. But such knowledge was merely notice to each of them that if it was successfully to compete for the first run business in important Texas cities it must meet the terms of competing distributors or lose the business of Interstate. It could compete successfully only by granting exclusive licenses to Interstate and injuring subsequent run houses by refusing them licenses,—a course clearly lawful,—or by doing the less drastic thing of agreeing to protect the good will of its pictures by putting necessary and not severely burdensome restrictions upon subsequent run exhibitors, which I think equally lawful.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER join in this opinion.

NATIONAL LABOR RELATIONS BOARD *v.* FANSTEEL METALLURGICAL CORP.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 436. Argued January 12, 13, 1939.—Decided February 27, 1939.

1. Seizure and forcible retention of an employer's factory buildings by employees, in a "sit-down" strike, is good cause for their discharge. P. 252.
2. The National Labor Relations Act does not undertake to abrogate the right of an employer to refuse to retain in his employ those who illegally take and hold possession of his property. P. 255.
3. The National Labor Relations Act is not to be construed as compelling employers to retain persons in their employ regardless of their unlawful conduct. In recognizing the right to strike it contemplates a lawful strike; and where a strike, even though actuated by unfair labor practices of the employer, is initiated

and conducted in lawlessness by the seizure and retention of the employer's property, and the strikers are discharged because of their lawlessness, they do not remain "employees" within the meaning of § 2 (3) and are not within the authority to reinstate "employees" reposed in the Board by § 10 (c). P. 256.

4. The provision of § 10 (c) of the Act, by which the Board may require an employer to take such affirmative action as will "effectuate the policies" of the Act, does not authorize the Board to require reëmployment of men who have been discharged for such unlawful conduct. P. 257.
5. Strikers who aided and abetted a "sit-down" strike are in no better case than the "sit-down" strikers themselves. Assuming that, through not having been formally discharged, they retained the status of "employees" by virtue of § 2 (3), that provision does not automatically reinstate them; and the provision that the Board may require "such affirmative action, including reinstatement of employees" as will "effectuate the policies" of the Act, will not countenance an order requiring reinstatement in such circumstances. P. 259.
6. An order of the National Labor Relations Board requiring reinstatement of employees must be supported by specific findings. P. 261.
7. An order of the Board that the employer bargain with a particular organization as exclusive representative of employees should not be enforced where by reason of valid discharges and new employments there is no ground to conclude that the organization is the choice of a majority of the employees for the purpose of collective bargaining. P. 261.
8. An order of the Board requiring an employer to withdraw recognition from an organization of employees should be upheld where there is substantial evidence that the formation of this organization was brought about through promotion efforts of the employer contrary to the provision of § 8 (2) of the Act. P. 262.

98 F. 2d 375, affirmed with modifications.

CERTIORARI, 305 U. S. 590, to review a judgment setting aside an order of the National Labor Relations Board.

Mr. Charles Fahy, with whom *Solicitor General Jackson,* and *Messrs. Charles A. Horsky, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf,* and *Ruth Weyand* were on the brief, for petitioner.

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The cease and desist portions of the order directed to violations of §§ 8 (1) and (5) of the Act are valid if the findings of the Board are supported by substantial evidence. *Consolidated Edison Co.* v. *National Labor Board,* 305 U. S. 197. The findings were so supported.

The Board's order of reinstatement based upon the violation of §§ 8 (1) and (5) was in all respects proper. Respondent's whole course of illegal conduct was responsible for the strike, and under such circumstances the normal and proper means by which the *status quo* may be restored is the reinstatement of the strikers to positions of employment.

That remedy is not beyond the power of the Board in this case because of the attempted discharge of some of the strikers for engaging in a "sit-down." The discharge did not remove those strikers from the class of persons described as "employees" under § 10 (c). Plainly the strikers here were within that category when the strike took place; and since the Act specifies only one way in which this statutory status may be ended—by equivalent employment elsewhere—it is reasonable to assume that Congress intended that status to continue despite an attempted discharge, at least for the remedial purposes of the Act. *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. 2d 138; cert. den., 304 U. S. 575. Once an unfair labor practice has occurred, the employer, although free to terminate the normal incidents of the employee relationship for cause, may not destroy the power of the Board to remedy his unfair labor practices, so long as the remedy required will effectuate the purposes of the Act.

Even if the reinstatement was not of "employees," nevertheless the order is valid. Section 10 (c) empowers the Board to require "such affirmative action, including reinstatement of employees . . . as will effectuate the policies of this Act." The clause—"including reinstate-

ment of employees"—is clearly illustrative and not intended as a limitation. The use of the word "including" and the reports in Congress each confirm what is but in any event the normal construction—that the Board shall have plenary power to remedy the effects of unfair labor practices, including the power to require reëmployment of former employees where that is required in order to effectuate the policies of the Act.

Nor was it an abuse of discretion for the Board to conclude that reinstatement would effectuate the policies of the Act. The Board could have effectually restored the *status quo* and dissipated the effects of respondent's unfair labor practices in no other way. Respondent can not object to the reinstatement of the men on the ground either that they had been guilty of misconduct or had been discharged because by reinstatement of strikers in each category it has itself shown that it regards neither fact as a bar to reinstatement. Respondent was willing to reinstate all the strikers who would surrender their right to bargain through the Union. Hence, the Board's order simply obliterates the distinction which respondent itself has drawn among strikers on the basis of their willingness or unwillingness to abandon the Union.

Employee wrongdoing is a factor to be taken into consideration by the Board, but under the circumstances of the present case it was not an abuse of discretion to order reinstatement.

The order of the Board properly required offers of reinstatement to all the strikers, even though respondent claimed that certain strikers were inefficient, and that it had abolished some positions by reorganizing its plant. Respondent, after complying with the order, may reduce or reorganize its staff on any non-discriminatory basis.

The provision which requires back pay only from the time when application for reinstatement is made by the strikers and is refused by respondent is proper.

The order properly requires respondent to bargain collectively with the Union upon request. *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515. The evidence shows that when the other provisions of the order are complied with by the reinstatement of the strikers and the discharge of those first employed since the unfair labor practices, the Union will have a clear majority in the appropriate unit. Even if the facts were not thus clear, some such presumption would be necessary to make the Act workable. *National Labor Relations Board* v. *Remington-Rand,* 94 F. 2d 862; cert. den., 304 U. S. 576.

The Board's finding that respondent dominated and interfered with the formation and administration of the Rare Metal Workers of America in violation of § 8 (2) of the Act is supported by clear and convincing evidence. On the basis of that violation, the Board properly ordered respondent to cease and desist, and to withdraw recognition from that union.

Respondent was not deprived of due process of law by the Board's rulings on its applications for certain subpoenas. Respondent, by its privilege of applying to the Circuit Court of Appeals for leave to adduce additional evidence under § 10 (e) and (f), was afforded a full remedy under the Act for any erroneous action of the Board. Not having availed itself of that privilege, respondent has no ground for complaint.

Mr. Max Swiren, with whom *Messrs. Benjamin V. Becker* and *Sidney H. Block* were on the brief, for respondent.

Section 2 (3) of the Act defines "employee" to include individuals who cease work by reason of a labor dispute or an unfair labor practice. The Congressional intent is that workers shall not lose their employee status by striking. This section does not destroy the employer's right to discharge striking employees for cause, nor does it,

conversely, confer upon striking employees immunity from discharge for cause.

Section 10 (c) authorizes the Board to command "such affirmative action, including the reinstatement of employees, with or without back pay, as will effectuate the policies of this Act." Only employees may be ordered reinstated. In asserting the power to require reinstatement of non-employees, the Board treats the phrase "including the reinstatement of employees" as superfluous. The specific definition of the reinstatement power qualifies and limits the general grant.

The constitutional protection of the employer's right of discharge can be required to give way only to the extent that it collides with the employee's coequal right of self-organization. The right of self-organization does not embrace a license to seize the employer's plant. The lawless occupation of plants is not and could not constitutionally be safeguarded by the Act. Construed in the light of the restraints imposed by the Fifth Amendment, the Act clearly preserves the employer's right to discharge employees for cause, whether they be at work or on strike, and confers upon the Board no power to compel employment of former employees.

The reinstatement of discharged employees guilty of the property destruction and lawlessness portrayed on this record can not advance either the immediate objective of collective bargaining or the ultimate end of industrial peace. Spurning the legal remedies available under the Act, including the pending proceeding before the Board, the sit-down strikers took the law into their own hands. The Board charges the employer with full responsibility for that violence, vandalism and lawlessness thus undertaken as a means of self-redress. That is nothing more than an approval of lynch law. The deliberate lawlessness disqualified the participants as suitable employees. Respondent had ample grounds for its apprehension that

their reëmployment would engender plant demoralization and strife. Contrary to the Board's argument, no conditions as to union membership or collective bargaining activity were imposed upon any persons reëmployed. Respondent accepted applications for reëmployment only from those believed to have been coerced and intimidated into remaining within the buildings. That action did not, as to the remaining men, either vitiate their valid discharge or qualify them as suitable employees. Their reinstatement can not effectuate the policies of the Act.

The reinstatement of persons (1) whose jobs have been abolished and (2) who are shown to have been inefficient, can not effectuate the policies of the Act. The Board dealt with these two groups by directing respondent to reinstate all of the persons involved and then to carry out a new internal reorganization, discharging those for whom there were no jobs or who were inefficient. Ordering the reinstatement of such persons would be productive only of futile plant disorganization and constitutes an abuse of discretion.

The back-pay provision of the order constitutes a penalty for seeking judicial review of the order. This is particularly true with respect to persons whose jobs have been abolished or who were shown to be inefficient. The order recognizes that upon their reinstatement they may be immediately discharged.

The court properly held that the elimination from the rolls of the employees dismissed for cause had completely dissipated any majority that Lodge 66 might have enjoyed. The Board is without power to order the recognition of Lodge 66 as the exclusive bargaining agency, in the face of the fact that it no longer represents a majority.

The record is wholly barren of any evidence to sustain the finding of domination and interference respecting the Rare Metal Workers of America, Local No. 1.

Not a single subpoena requested by the respondent was granted before or during the eighteen-day hearing. Not a single subpoena desired by the Board's attorney was refused. This arbitrary and discriminatory refusal denied to the respondent the fair hearing required by the Fifth Amendment.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Circuit Court of Appeals set aside an order of the National Labor Relations Board requiring respondent to desist from labor practices found to be in violation of the National Labor Relations Act and to offer reinstatement to certain discharged employees with back pay. While the other portions of the Board's order are under review, the principal question presented relates to the authority of the Board to require respondent to reinstate employees who were discharged because of their unlawful conduct in seizing respondent's property in what is called a "sit-down strike."

Respondent, Fansteel Metallurgical Corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of products made from rare metals. No question is raised as to the intimate relation of its operations to interstate commerce or the effect upon that commerce of the unfair labor practices with which the corporation is charged. The findings of the Board show that in the summer of 1936 a group of employees organized Lodge 66 under the auspices of a committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America; that respondent employed a "labor spy" to engage in espionage within the Union and his employment was continued until about December 1, 1936; that on September 10, 1936, respondent's superintendent was requested to meet with a committee of the Union and the superintendent required that the committee should con-

sist only of employees of five years' standing; that a committee, so constituted, presented a contract relating to working conditions; that the superintendent objected to "closed-shop and check-off provisions" and announced that it was respondent's policy to refuse recognition to "outside" unions; that on September 21, 1936, the superintendent refused to confer with the committee in which an "outside" organizer had been included; that meanwhile, and later, respondent's representatives sought to have a "company union" set up, but the attempt proved abortive; that from November, 1936, to January, 1937, the superintendent required the president of the Union to work in a room adjoining the superintendent's office with the purpose of keeping him away from the other workers; that while in September, 1936, the Union did not have a majority of the production and maintenance employees, an appropriate unit for collective bargaining, by February 17, 1937, 155 of respondent's 229 employees in that unit had joined the Union and had designated it as their collective bargaining representative; that on that date, a committee of the Union met twice with the superintendent, who refused to bargain with the Union as to rates of pay, hours and conditions of employment, the refusal being upon the ground that respondent would not deal with an "outside" union.

Shortly after the second meeting in the afternoon of February 17th the Union committee decided upon a "sit-down strike" by taking over and holding two of respondent's "key" buildings. These were thereupon occupied by about 95 employees. Work stopped and the remainder of the plant also ceased operations. Employees who did not desire to participate were permitted to leave, and a number of Union members who were on the night shift and did not arrive for work until after the seizure did not join their fellow members inside the buildings. At about six o'clock in the evening the superintendent,

accompanied by police officials and respondent's counsel, went to each of the buildings and demanded that the men leave. They refused, and respondent's counsel "thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings." The men continued to occupy the buildings until February 26, 1937. Their fellow members brought them food, blankets, stoves, cigarettes and other supplies.

On February 18th, respondent obtained from the state court an injunction order requiring the men to surrender the premises. The men refused to obey the order and a writ of attachment for contempt was served on February 19th. Upon the men's refusal to submit, a pitched battle ensued and the men successfully resisted the attempt by the sheriff to evict and arrest them. Efforts at mediation on the part of the United States Department of Labor and the Governor of Illinois proved unavailing. On February 26th the sheriff with an increased force of deputies made a further attempt and this time, after another battle, the men were ousted and placed under arrest. Most of them were eventually fined and given jail sentences for violating the injunction.

Respondent on regaining possession undertook to resume operations, and production gradually began. By March 12th the restaffing was approximately complete. A large number of the strikers, including many who had participated in the occupation of the buildings, were individually solicited to return to work with back pay but without recognition of the Union. Some accepted the offer and were reinstated; others refused to return unless there were union recognition and mass reinstatement, and were still out at the time of the hearing before the Board. New men were hired to fill the positions of those remaining on strike.

Meanwhile the Union was not inactive. On March 3d and 5th there were requests, which respondent refused,

for meetings to consider the recognition of the Union for collective bargaining. There was no collective request for reinstatement of all the strikers. The position of practically all the strikers who did not go back, and who were named in the complaint filed with the Board, was "that they were determined to stay out until the Union reached a settlement with the respondent."

Early in April a labor organization known as Rare Metal Workers of America, Local No. 1, was organized among respondent's employees. There was a meeting in one of respondent's buildings on April 15th, which was attended by about 200 employees, and the balloting resulted in a vote of 185 to 15 in favor of the formation of an "independent" organization. Another meeting was held soon after for the election of officers. Respondent accorded these efforts various forms of support. The Board concluded that the Rare Metal Workers of America, Local No. 1, was the result of the respondent's "anti-union campaign" and that respondent had dominated and interfered with its formation and administration.

Upon the basis of these findings and its conclusions of law, the Board made its order directing respondent to desist from interfering with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing as guaranteed in § 7 of the Act; from dominating or interfering with the formation or administration of the Rare Metal Workers of America, Local No. 1, or any other labor organization of its employees or contributing support thereto; and from refusing to bargain collectively with the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of the employees described. The Board also ordered the following affirmative action which it was found would "effectuate the policies" of the Act;—that is, upon request, to bargain collectively with the Amal-

gamated Association as stated above; to offer, upon application, to the employees who went on strike on February 17, 1937, and thereafter, "immediate and full reinstatement to their former positions," with back pay, dismissing, if necessary, all persons hired since that date; to withdraw all recognition from Rare Metal Workers of America, Local No. 1, as a representative of the employees for the purpose of dealing with respondent as to labor questions, and to "completely disestablish" that organization as such representative; and to post notices of compliance. 5 N. L. R. B. 930.

The Board found that respondent had not engaged in unfair labor practices by "discrimination in regard to hire or tenure of employment" in order to "encourage or discourage membership in any labor organization," and accordingly the complaint under § 8 (3) of the Act was dismissed. *Id.*

On respondent's petition, the Circuit Court of Appeals set aside the Board's order, 98 F. 2d 375, and this Court granted certiorari, 305 U. S. 590.

First. The unfair labor practices.—The Board concluded that by "the anti-union statements and actions" of the superintendent on September 10, 1936, and September 21, 1936, by "the campaign to introduce into the plant a company union," by "the isolation of the Union president from contact with his fellow employees," and by the employment and use of a "labor spy," respondent had interfered with its employees, and restrained and coerced them, in the exercise of their right to self-organization guaranteed in § 7 of the Act, and thus had engaged in an unfair labor practice under § 8 (1) of the Act.

Owing to the fact that in September, 1936, the Union did not have a majority of the employees in the appropriate unit, the Board held that it was precluded from finding unfair labor practices in refusing to bargain collectively at that time, but the Board found that there

was such a refusal on February 17, 1937, when the Union did have a majority of the employees in the appropriate unit, and that this constituted a violation of § 8 (5).

These conclusions are supported by the findings of the Board and the latter in this relation have substantial support in the evidence.

Second. The discharge of the employees for illegal conduct in seizing and holding respondent's buildings.—The Board does not now contend that there was not a real discharge on February 17th when the men refused to surrender possession. The discharge was clearly proved.

Nor is there any basis for dispute as to the cause of the discharge. Representatives of respondent demanded that the men leave, and on their refusal announced that they were discharged "for the seizure and retention of the buildings." The fact that it was a general announcement applicable to all the men in the plant who thus refused to leave does not detract from the effect of the discharge either in fact or in law.

Nor is it questioned that the seizure and retention of respondent's property were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit.

This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property.

Third. The authority of the Board to require the reinstatement of the employees thus discharged.—The contentions of the Board in substance are these: (1) That

the unfair labor practices of respondent led to the strike and thus furnished ground for requiring the reinstatement of the strikers; (2) That under the terms of the Act employees who go on strike because of an unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct; (3) That the Board was entitled to order reinstatement or reëmployment in order to "effectuate the policies" of the Act.

(1) For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. We may put on one side the contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ. To say that respondent could resort to the state court to recover damages or to procure punishment, but was powerless to discharge those responsible for the unlawful seizure would be to create an anomalous distinction for which there is no warrant unless it can be found in the terms of the National Labor Relations Act. We turn to the provisions which the Board invokes.

(2) In construing the Act in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, 46, we said that it "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"; that the employer "may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." See, also, *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 132. Compare *Texas & New Orleans R. Co.* v. *Brotherhood,* 281 U. S. 548, 571; *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 559.

It is apparent under that construction of the Act that had there been no strike, and employees had been guilty of unlawful conduct in seizing or committing depredations upon the property of their employer, that conduct would have been good reason for discharge, as discharge on that ground would not be for the purpose of intimidating or coercing employees with respect to their right of self-organization or representation, or because of any lawful

union activity, but would rest upon an independent and adequate basis.

But the Board, in exercising its authority under § 10 (c) to reinstate *"employees,"* insists that here the status of the employees was continued, despite discharge for unlawful conduct, by virtue of the definition of the term *"employee"* in § 2 (3). By that definition the term includes

"any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, . . ."

We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision.

We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* p. 33. To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. *Associated Press* v. *National Labor Relations Board, supra.* The conduct thus protected is lawful conduct.

Congress also recognized the right to strike,—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act "shall be construed so as to interfere with or impede or diminish in any way the right to strike." But this recognition of "the right to strike" plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work. As we said in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347, "if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act." There is thus abundant opportunity for the operation of § 2 (3) without construing it as countenancing lawlessness or as intended to support employees in acts of violence against the employer's property by making it impossible for the employer to terminate the relation upon that independent ground.

Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the Union committee "to take over and hold two of the respondent's 'key' buildings." It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of "the right to strike" to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment

upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.

(3) The Board contends that its order is valid under the terms of the Act "regardless of whether the men remained employees." The Board bases its contention on the general authority, conferred by § 10 (c), to require the employer to take such affirmative action as will "effectuate the policies" of the Act. Such action, it is argued, may embrace not only reinstatement of those whose status as employees has been continued by virtue of § 2 (3), but also a requirement of the "reëmployment" of those who have ceased to be employed.

The authority to require affirmative action to "effectuate the policies" of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes. Thus in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies

of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. Elections may be ordered to decide what representatives are desired by the majority of employees in appropriate units as determined by the Board. To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reëmployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

What we have said also meets the point that the question whether reinstatement or reëmployment would effectuate the policies of the Act is committed to the decision of the Board in the exercise of its discretion subject only to the limitation that its action may not be "arbitrary, unreasonable or capricious." The Board recognizes that in "many situations" reinstatement or reëmployment after discharge for illegal acts would not be proper, but the Board insists that it was proper in this instance. For the reasons we have given we disagree with that view. We think that a clearer case could hardly be presented and that, whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review.

The Board stresses the fact that, when respondent was able to obtain possession of its buildings and to resume operations, it offered reëmployment to many of the men who had participated in the strike. The contention confuses what an employer may voluntarily and legally do in the exercise of his right of selection and what the Board is entitled to compel. In announcing the reopening respondent stated its belief that a large number of men who had taken part in the seizure of the plant were compelled to do so through coercion and intimidation and that applications for reëmployment from such men would receive favorable consideration. The Board challenges the statement that respondent limited its rehiring to such applicants. The Board points to evidence showing that everyone who applied for reëmployment during the period of restaffing was taken back without condition except two employees who were advanced in years and were not reinstated solely for that reason, and to the testimony of the superintendent that at least thirty-seven were rehired "who had been in the sit-down."

We find it unnecessary to consider in detail the respective contentions as to respondent's offer of reëmployment, for we think that its action did not alter the unlawful character of the strike or respondent's rights in that aspect. The important point is that respondent stood absolved by the conduct of those engaged in the "sit-down" from any duty to reëmploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reëmployment if it chose. In so doing it was simply exercising its normal right to select its employees.

Fourth. The requirement of reinstatement of employees who aided and abetted those who seized and held the buildings.—There is a group of fourteen persons in this class who were not within the buildings and hence do not appear to have been within the announcement of dis-

charge, but who went on strike and fall within the order for reinstatement. The Board made no separate findings with respect to these particular persons and refers us to the evidence to show their relation to the transactions under review. This, however, sufficiently appears in the stipulation of facts, to which the Board was a party, naming in paragraph 12 these fourteen persons and describing their conduct as follows:

"All of the following men were employees of the company on February 17, 1937, but did not participate in the seizure and retention of the building, but aided and abetted the men within the said buildings 3 and 5 in the retention of the said buildings by soliciting, procuring and delivering of food, bedding, cigarettes, stoves, or other supplies, or in some other manner, and thereby assisted the said men in buildings 3 and 5 to remain therein contrary to the injunctional order and writ of injunction heretofore mentioned; that all of the said men named in this paragraph had actual knowledge of the issuance of the said injunctional order and writ of injunction ordering and directing the men in buildings 3 and 5 to vacate the same, and that their activities in aiding and abetting the men in buildings 3 and 5 were done with a view to and for the purpose of assisting the said men to remain in the said buildings after the issuance of the said injunctional order and writ of injunction and with knowledge thereof. None of the men named in this paragraph were discharged by the company on February 17, 1937, or thereafter, and none of these men were recalled to work by the company upon the resumption of plant operations shortly after February 26th, 1937:" (the names follow).

It cannot be said that independently of the Act respondent was bound to reinstate those who had thus aided and abetted the "sit-down" strikers in defying the court's order. If it be assumed that by virtue of § 2 (3)

they still had the status of "employees," that provision did not automatically provide reinstatement. Whether the Board could order it must turn on the application of the provision empowering the Board to require "such affirmative action, including reinstatement of employees" as will "effectuate the policies" of the Act. We are thus returned to the question already discussed and we think that in that respect these aiders and abettors, likewise guilty of unlawful conduct, are in no better case than the "sit-down" strikers themselves. We find no ground for concluding that there is any policy of the Act which justifies the Board in ordering reinstatement in such circumstances.

Fifth. There are nine other persons apparently embraced within the order of reinstatement as to which respondent interposes special objections. As to seven, respondent objects to the reinstatement upon the ground that they were inefficient and that no showing of union activity by any of them was made. As to two others, respondent contends that they refused its request to return to work without any conditions and that their places were accordingly filled.

With respect to these nine persons, and to a miscellaneous group of five others including three as to whom the trial examiner recommended dismissal of the complaint, the Board has not supplied specific findings upon the points in controversy to sustain its order.

We are of the opinion that the Circuit Court of Appeals did not err in setting aside the requirement of reinstatement.

Sixth. The requirement that respondent shall bargain collectively with Lodge 66 of the Amalgamated Association as the exclusive representative of the employees in the described unit.

Respondent resumed work about March 12, 1937. The Board's order was made on March 14, 1938. In view of

the change in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining. The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election.

Seventh. The requirement that respondent shall withdraw all recognition from Rare Metal Workers of America, Local No. 1.

While respondent presents a strong protest, insisting that Local No. 1 of the Rare Metal Workers was the free choice of the employees after work was resumed, we cannot say that there is not substantial evidence that the formation of this organization was brought about through promotion efforts of respondent contrary to the provision of § 8 (2), and we think that the order of the Board in this respect should be sustained. Whether Rare Metal Workers of America, Local No. 1, or any other organization, is the choice of the majority of the employees in the proper unit can be determined by proceedings open to the Board.

The provisions of the Board's order contained in Paragraph 1, subdivisions (a) and (b), in Paragraph 2, subdivision (d), and in Paragraph 2, subdivisions (e) and (f) so far as these refer to the first-mentioned provisions, and the final Paragraph of the order dismissing the charge

under § 8 (3) of the Act, are sustained. The other provisions of the order are set aside.

The judgment of the Circuit Court of Appeals is modified accordingly and as modified is affirmed.

Modified and Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this case.

MR. JUSTICE STONE, concurring in part.

I concur in so much of the Court's decision as holds that the Board was without statutory authority to order reinstatement of those employees who were discharged on February 17, 1937. But I rest this conclusion solely on the construction of § 2 (3) and § 10 (c) of the National Labor Relations Act. By § 10 (c) the Board is given authority to reinstate in their employment only those who are "employees." Before the Board made its order, respondent's employees, by reason of their lawful discharge for cause, had lost their status as such, which would otherwise have been preserved to them under § 2 (3).

The National Labor Relations Act, as its purpose and scope are disclosed by its preamble and operative provisions and explained by the reports of the Congressional committees recommending its enactment, Report No. 573, Senate Committee on Education and Labor, 74th Cong., 1st Sess.; Report No. 1147, House Committee on Labor, 74th Cong., 1st Sess., is aimed at securing the peaceable settlement of labor disputes by the prevention of unfair labor practices of the employer and by requiring him to bargain collectively with his employees. Since one means adopted by the Act to secure this end is the reinstatement, by the discretionary action of the National Labor Relations Board, of employees when unfair labor

practices have caused them to cease work, it was necessary to provide that they should not lose their status as employees by reason of that fact. This was accomplished by § 2 (3), which provides:

"The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. . . ."

Having in mind the purposes of the Act and the end sought by the enactment of this section, I think its fair meaning is that attributed to it by the Senate Committee Report, *supra,* pp. 6–7, which declared:

"The bill thus observes the principle that men do not lose their right to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy. . . . And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby."

But it does not follow because the section preserves this right to employees where they have ceased work by reason of a labor dispute or unfair labor practice, that its language is to be read as depriving the employer of his right, which the statute does not purport to withdraw, to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason—their discharge for unlawful practices which the Act does not countenance.

There is nothing in the Act, read as a whole, to indicate such a purpose, and there is no language in § 2 (3) directed to such an end. I cannot attribute to Congress in the adoption of § 2 (3), explained as it was in the Senate Committee Report, a purpose to cut off the right of an employer to discharge employees who have destroyed his factory and to refuse to reëmploy them, if that is the real reason for his action. If a plainer indication of such a purpose had been given by the language of § 2 (3), I should have thought it of sufficiently dubious constitutionality to require us to construe its language otherwise, if that could reasonably be done, leaving it to Congress to say so, in unmistakable language, if it really meant to impose that duty on the employer.

As to the fourteen employees who aided and abetted the sit-down strike, but who were not discharged, I think they retained their status under § 2 (3), and that the Board had power to reinstate them. Whether that power should be exercised was a matter committed to the Board's discretion, not ours.

In other respects I concur with the decision of the Court.

MR. JUSTICE REED, dissenting in part.

This Court agrees with the conclusion of the Labor Board that the respondent was guilty of unfair labor practices, prior to the strike, in campaigning for a company union, isolating the union president, making, through its superintendent, anti-union statements, and employing a labor spy. It also accepts the Board's conclusion that there was further pre-strike violation by respondent of the Labor Relations Act by refusal to bargain collectively. None questions the power of the Board to reinstate striking employees as a means of redress for unfair labor practices. The issue while important

is narrow. Can an employee, on strike or let out by an unfair labor practice, be discharged, finally, by an employer so as to be ineligible for reinstatement under the act?

The issue so stated glows feebly apart from the fire of controversy. But it may permit a more objective appraisal than to examine it when illustrated by conduct on the part of the employees which is thought to put "a premium on resort to force" and to subvert "the principles of law and order which lie at the foundations of society." None on either side of the disputed issue need be suspected of "countenancing lawlessness," or of encouraging employees to resort to "violence in defiance of the law of the land." Disapproval of a sit-down does not logically compel the acceptance of the theory that an employer has the power to bar his striking employee from the protection of the Labor Act.

The Labor Act was enacted in an effort to protect interstate commerce from the interruptions of labor disputes. This object was sought through prohibition of certain practices deemed unfair to labor, and the sanctions adopted to enforce the prohibitions included reinstatement of employees. To assure that the status of strikers was not changed from employees to individuals beyond the protection of the act, the term employee was defined to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . ." § 2 (3), Act of July 5, 1935. Without this assurance of the continued protection of the act, the striking employee would be quickly put beyond the pale of its protection by discharge. As now construed by the Court, the employer may discharge any striker, with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining. Friction easily engendered by labor strife may readily give rise to con-

duct, from nose-thumbing to sabotage, which will give fair occasion for discharge on grounds other than those prohibited by the Labor Act.

The Congress sought by clear language to eliminate this prolific source of ill feeling by the provision just quoted which should be interpreted in accordance with its language as continuing the eligibility of a striker for reinstatement regardless of conduct by the striker or action by the employer. The constitutional problem involved in such a conclusion is not different from the one involved in compelling an employer to reinstate an employee, discharged for union activity. There is here no protection for unlawful activity. Every punishment which compelled obedience to law still remains in the hands of the peace officers. It is only that the act of ceasing work in a current labor dispute involving unfair labor practices suspends for a period, not now necessary to determine, the right of an employer to terminate the relation. The interference with the normal exercise of the right to discharge extends only to the necessity of protecting the relationship in industrial strife.

The point is made that an employer should not be compelled to reëmploy an employee guilty, perhaps, of sabotage. This depends upon circumstances. It is the function of the Board to weigh the charges and countercharges and determine the adjustment most conducive to industrial peace. Courts certainly should not interfere with the normal action of administrative bodies in such circumstances. Here both labor and management had erred grievously in their respective conduct. It cannot be said to be unreasonable to restore both to their former status. Such restoration would apply to the sit-down strikers and those striking employees who aided and abetted them.

I am of the view that the provisions of the order of the Board ordering an offer of reinstatement to the em-

ployees discussed above should be sustained. As the remainder of the order is affected by the determination upon this issue but not wholly controlled by the conclusions, no opinion is expressed as to the other requirements of the order.

MR. JUSTICE BLACK concurs in this dissent.

EICHHOLZ *v.* PUBLIC SERVICE COMMISSION OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 367. Argued February 1, 1939.—Decided February 27, 1939.

1. Under Judicial Code § 266, that part of a decree of the three-judge District Court which denied a permanent injunction is reviewable directly by this Court independently of other provisions of the decree, not final, concerning a counterclaim. P. 269.
2. Mere pendency before the Interstate Commerce Commission of an application under the Federal Motor Carrier Act to operate as a motor carrier in interstate commerce does not supersede the authority of a State to enforce reasonable regulations of traffic upon its highways with respect to such applicant. P. 273.
3. For the effectuation of its laws requiring common carriers by motor to obtain certificates of public convenience and necessity before operating intrastate, a State may forbid intrastate business by carriers who have not such certificates but have permits from the State for use of its highways in interstate commerce only; and where an interstate carrier evades the prohibition by carrying goods from within the State to a place near to and beyond its boundary and then carrying them back for delivery in the State near the boundary, the State may revoke his permit. P. 273.

   In the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected.

23 F. Supp. 587, affirmed.

APPEAL from a decree denying a preliminary injunction against enforcement of an order revoking the appellant's permit to operate in Missouri as an interstate carrier by motor.

Messrs. Smith B. Atwood and *D. D. McDonald,* with whom *Mr. Frank E. Atwood* was on the brief, for appellant.

Messrs. James H. Linton and *Daniel C. Rogers* for appellees.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This is an appeal from a decree of the District Court, composed of three judges, holding valid an order of the Public Service Commission of Missouri which revoked appellant's permit as an interstate carrier, and denying a permanent injunction restraining the Commission and certain state officers from prosecuting suits against appellant for using the highways of the State in the transportation of property for hire in interstate commerce. 23 F. Supp. 587.

By a supplementary answer, the Public Service Commission pleaded a counterclaim for fees alleged to be due to the State for the use of its highways since the granting of the restraining order which was issued on the institution of the suit. The District Court adjudged the defendants entitled to recover on the counterclaim and appointed a special master to take the necessary accounting. As the decree is not a final one so far as the counterclaim is concerned, the appellees move to dismiss the appeal. The motion is denied. The decree denied a permanent injunction and this Court has jurisdiction of a direct appeal from that part of the decree by virtue of the express provision of the statute. Judicial Code, § 266; 28 U. S. C. 380. Compare *Public Service Comm'n* v. *Brashear Freight*

Lines, ante, p. 204. See *Smith* v. *Wilson,* 273 U. S. 388, 390, 391; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10, 14.

Since 1931 appellant, Frank Eichholz, has operated freight trucks in interstate commerce between the States of Missouri, Iowa and Kansas and has maintained terminal facilities in St. Louis, Missouri, Kansas City, Kansas, and other places in Kansas and Iowa. Prior to the passage of the Federal Motor Carrier Act of 1935 (49 U. S. C. 301 *et seq.*), he obtained a permit from the Public Service Commission of Missouri "to operate as a freight carrying motor carrier over an irregular route" between points in Missouri and points beyond that State, "exclusively in interstate commerce." He did not seek or obtain from the Commission an intrastate permit.

On the passage of the federal act, appellant applied for a permit from the Interstate Commerce Commission, and that application was still pending at the time of the hearing below and argument here.

When the state permit was granted, and thereafter, there was in force Rule No. 44 of the Public Service Commission which provided as follows:

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

In December, 1936, after hearing, the Commission revoked appellant's permit, holding this rule to have been violated. Its decision was based upon a finding that ap-

pellant had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business; that as a subterfuge he had hauled freight originating in St. Louis, Missouri, and destined to Kansas City, Missouri, and *vice versa,* through his terminal in Kansas City, Kansas, which was located less than one-half mile from the Missouri state line. The Commission stated that the testimony showed an industrious solicitation by appellant for the transportation of freight between St. Louis, Missouri, and Kansas City, Missouri, on the basis of his quoted interstate rate between such cities as set forth in his tariff filed with the Interstate Commerce Commission, which rate was much lower than the established rate for intrastate carriers operating between these cities, and that by such means a large volume of business had been developed. It appeared that he was carrying freight at the interstate first-class rate of sixty cents per cwt. between St. Louis, Missouri, and Kansas City, Missouri, through his terminal at Kansas City, Kansas, while the similar intrastate freight rate established by the Public Service Commission between the two cities in Missouri was ninety-two cents per cwt.

On the challenge in this suit of the validity of the Commission's order, the District Court heard the evidence of the parties and found that the carriage of property from St. Louis, Missouri, to Kansas City, Kansas, and thence back into Kansas City, Missouri, for delivery, was not "the normal, regular or usual route" for shipping merchandise between the two cities in Missouri; that the route used by appellant to his terminal at Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise after it had been hauled in the first instance to the terminal; that after reaching the terminal in Kansas City, Kansas, appellant in many instances did not unload the merchandise, that much of such shipments was in

carload lots, and that the method employed was to haul the merchandise to his terminal in Kansas City, Kansas, "where a new driver, either with the same tractor and trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri"; that in some instances merchandise was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri, but that this was "a negligible percentage of the shipment between Missouri points"; and that the method of operation which appellant employed was designed to afford shippers the benefit of a lower rate and was not in good faith.

First. By § 5268 (a) of the Missouri Bus and Truck Act (Laws of 1931, pp. 307, 308), the State declared it to be unlawful for any common carrier by motor to furnish service within the State without first having obtained from the Commission a certificate of public convenience and necessity. By § 5268 (b) it was declared unlawful for any motor carrier (with certain exceptions not material here) to use any of the public highways of the State in interstate commerce without first having obtained a permit from the Commission. It was provided that in determining whether such a permit should be issued, the Commission should give consideration "to the kind and character of vehicles permitted over said highway" and should require the filing "of a liability insurance policy or bond" in such sum and upon such conditions as the Commission might deem necessary to protect adequately the interest of the public in the use of the highway. The statute also authorized the Public Service Commission to prescribe regulations governing motor carriers.

Appellant's complaint did not attack these statutes; on the contrary he asserted that he had fully complied with their provisions. His complaint was of the or-

der of the Commission revoking his permit. We confine ourselves to the question thus presented.

Second. When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded. *Welch Co.* v. *New Hampshire, ante,* p. 79; compare *McDonald* v. *Thompson,* 305 U. S. 263.

Third. Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question. *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Morris* v. *Duby,* 274 U. S. 135, 143; *Clark* v. *Poor,* 274 U. S. 554, 556, 557; *South Carolina Highway Dept.* v. *Barnwell Brothers,* 303 U. S. 177, 189; compare *Buck* v. *Kuykendall,* 267 U. S. 307, 315; *Interstate Busses Corp.* v. *Holyoke Ry. Co.,* 273 U. S. 45, 51; *Sprout* v. *South Bend,* 277 U. S. 163, 169.

Rule 44 was plainly designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic. The rule simply sought to hold to his choice the one who had sought and obtained a permit exclusively for interstate transportation. Appellant was entirely free to conduct that transportation if he did not engage in the intrastate business for which he had deliberately refrained from qualifying himself. We cannot see that the rule on its

face imposed any improper burden upon interstate commerce and the question is whether it did so through the application that the Commission has made of it.

Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17; *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404. That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See *Lone Star Gas Co.* v. *Texas*, 304 U. S. 224, 238. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Morgan's S. S. Co.* v. *Louisiana*, 118 U. S. 455; *Smith* v. *Alabama*, 124 U. S. 465; *Kelly* v. *Washington*, 302 U. S. 1, 9, 10. If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. And if the prohibition of such transactions was valid, the Commission was undoubtedly entitled to enforce it by revoking appellant's permit for breach of

the condition upon which it was issued and accepted by appellant.

Fourth. The ultimate question is thus one of fact, whether the transactions of appellant were of the character described by the Commission and in the findings of the District Court.

The transcript of the record before the Commission was introduced before the court, but neither that evidence nor the additional evidence taken by the court is presented *in extenso* by the record here. The parties properly filed, in connection with this appeal, condensed statements of the evidence upon which they respectively relied. An examination of these statements discloses no reason for disturbing the court's findings.

Appellant stresses the fact that he had selected his terminal in Kansas City, Kansas, at the beginning of his operations as a motor carrier, about 1932, and that it was a convenient and proper location. But that fact does not alter the nature of the transactions under review. There was a variance in the testimony as to the extent of the appellant's business which was conducted in violation of his permit, but there was adequate basis for the court's finding that it was a considerable portion of his operations and justified the action of the Commission.

The decree of the District Court so far as it denies an injunction is

Affirmed.

UNITED STATES *v.* BERTELSEN & PETERSEN ENGINEERING CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 416. Argued February 3, 1939.—Decided February 27, 1939.

1. A taxpayer having overpaid internal revenue taxes for 1917, the Commissioner ordered a refund of part of the overpayment and credited the balance to a deficiency in 1918 taxes, although assessment of the latter was then barred by limitations. The taxpayer sued the United States to recover judgment in the amount so credited. The collector who had wrongfully collected the excess 1917 taxes was dead or out of office at the time this proceeding was begun. *Held:*

   (1) The Circuit Court of Appeals correctly ruled that timely and proper claim for the overpayment for 1917 had been made as required by R. S. 3226, as amended and reënacted by Revenue Act of 1926, and that the suit was brought "to recover that part of a claim for refund of the 1917 over-payment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918." P. 279.

   (2) The certificate of overassessment issued by the Commissioner, ordering refund of part of a disclosed overpayment for 1917 and crediting the balance to a deficiency for 1918, did not constitute an account stated between the Government and the taxpayer, who did not assent. P. 280.

   (3) The suit was within the jurisdiction of the District Court under Jud. Code § 24 (20), as amended. Distinguishing *Lowe Bros. Co.* v. *U. S.*, 304 U. S. 302. P. 280.

2. A suit brought by a taxpayer to recover admitted overpayments of internal revenue taxes for 1922 to 1925, made to a collector who at the beginning of the suit was out of office, which overpayments the Commissioner undertook to credit against alleged deficiencies of taxes for 1926 to 1928, *held* not a suit to recover payments on account of taxes for 1926 to 1928, but one for the recovery of overpayments for 1922 to 1925, in respect of which timely claims for refunds had been filed; and that the suit was within the juris-

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*Together with No. 437, *United States* v. *Jaffray, et al., Trustees.* Certiorari to the Circuit Court of Appeals for the Eighth Circuit. Argued February 2, 3, 1939.—Decided February 27, 1939.

diction of the District Court under Jud. Code § 24 (20) as amended. P. 281.

98 F. 2d 132, 97 F. 2d 488, affirmed.

CERTIORARI, 305 U. S. 590, to review affirmances of judgments for the taxpayers in two suits brought in the District Courts to recover overpayments of federal taxes. For earlier opinions in No. 416, see 60 F. 2d 745; 95 F. 2d 867; 49 F. 2d 395; 14 F. Supp. 868.

Mr. Charles A. Horsky, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* were on the briefs, for the United States.

Mr. Hayner N. Larson, with whom *Mr. J. B. Faegre* was on the brief, for respondents in No. 437.

Mr. O. Walker Taylor for respondent in No. 416.

Mr. John E. Hughes, by leave of Court, filed a brief, as *amicus curiae.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In each of these causes counsel for the United States maintain the District Court was without jurisdiction to determine the issues. The Circuit Courts of Appeal ruled otherwise and approved judgments for respondents. The collectors who received the excess taxes in question were either dead or out of office when the proceedings to recover were commenced. The question of jurisdiction only is open for our consideration.

Section 145 Judicial Code [1] empowers the Court of Claims to hear and determine claims against the United

[1] Tucker Act March 3, 1887, c. 359, 24 Stat. 505; Act June 27, 1898, c. 503, 30 Stat. 494; July 1, 1898, c. 546, 30 Stat. 597, 649; February 26, 1900, c. 25, 31 Stat. 33; March 3, 1911, 36 Stat. 1087, 1136; U. S. C. Title 28, § 250 (1).

States arising out of contract, express or implied. Prior to 1921 § 24 (20) Judicial Code gave District Courts concurrent jurisdiction when the claim did not exceed Ten Thousand Dollars.[2]

The Acts of 1921, 1924, 1925 and 1926[3] enlarged the jurisdiction of District Courts by adding the following to § 24 (20) Judicial Code:

"Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

Section 3226 Revised Statutes as amended and reënacted by Revenue Act 1926, c. 27, § 1113 (a), 44 Stat. 9, 116 provides—

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or col-

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[2] "The district courts shall have original jurisdiction as follows: . . .

"Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, . . ."

Act March 3, 1911, 36 Stat. 1087, 1091, 1093; U. S. C. Title 28, § 41 (20).

[3] See Act November 23, 1921, c. 136, 42 Stat. 227, 311; June 2, 1924, c. 234, 43 Stat. 253, 348; February 24, 1925, c. 309, 43 Stat. 972; February 26, 1926, c. 27, 44 Stat. 9, 121. U. S. C. Title 28, § 41 (20)

lected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, . . . No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 3226 was further amended by Act June 6, 1932, c. 209, § 1103 (a), 47 Stat. 169, 286, so as to read as shown in the margin.[4]

No. 416.

The Commissioner of Internal Revenue undertook to deduct more than Ten Thousand Dollars from an admitted overpayment by respondent upon 1917 taxes and to apply this to a declared deficiency for 1918 taxes then barred by the Statute of Limitations. By this suit respondent seeks a judgment for the amount so deducted.

The Circuit Court of Appeals properly held "this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a

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[4] "Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, . . . No such suit or proceeding shall be begun . . . after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

U. S. C. Title 26, §§ 1672–1673.

deficiency tax for 1918." Also, rightly we think, that timely and proper claim for the overpayment for 1917 had been made as required by § 3226 Revised Statutes as reënacted 1926.

And we accept the conclusions stated in the following excerpt from its opinion—

"The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34, of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918. It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. Goodrich, Admr. *v.* Coffin, 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund. . . . the suit was one which could have been brought against a Collector, if living, but who is now dead or out of office."

Lowe Bros. Co. v. *United States,* 304 U. S. 302, 303, is not controlling. There the suit was begun in the District Court to recover an overpayment of 1917 taxes the alleged result of a credit made by the Commissioner from an admitted overpayment for 1918. For this no action could have been maintained against the collector—he did not

make or authorize the credit. Therefore, the amendment to § 24 (20) Judicial Code (28 U. S. C. § 41 (20)) enlarging the jurisdiction of the District Court had no application. Here the collector might have been sued since he wrongly received payment on account of 1917 taxes. The present cause falls within the very words of the amendment.

No. 437.

Respondents overpaid internal revenue taxes in sums exceeding Ten Thousand Dollars for 1922, 1923 and 1924; and for 1925, $7,800. The Commissioner issued certificates to that effect August 16, 1933. He refused to repay these sums but undertook to credit them to deficiencies which he assessed against respondents for 1926, 1927, 1928.

Thereupon this suit was brought to recover the overpayments for 1922 to 1925 under § 24 (20) Judicial Code as amended (U. S. C. Title 28, § 41 (20)) which gives District Courts jurisdiction in respect of taxes erroneously received by a collector out of office. Respondents maintain that, in fact, there were no deficiencies for 1926, 1927, 1928, and that by attempting to credit overpayments for 1922 to 1925 against non-existing deficiencies the Commissioner in effect denied their claims for refund.

On the other hand petitioner insists that the Commissioner's action in allowing the overpayments and crediting them against alleged deficiencies amounted to payments on account of taxes assessed for 1926 to 1928. And, as it was the Commissioner and not the collector who caused such credit of overpayments to deficiencies, the District Court was without jurisdiction.

The Circuit Court of Appeals held the suit was one to recover overpayments admittedly made to the collector and in respect of which timely claims for refund had been filed.

It said—

"The crediting of the overpayments, by the Commissioner, against taxes due from the taxpayer for other years was a matter of defense, a justification for the failure to refund, and not a matter which destroyed the taxpayer's cause of action or ousted the court of jurisdiction."

This conclusion we think is correct. Other points suggested, so far as presently important, are sufficiently answered by what has been said in No. 416.

Both of the challenged judgments must be

Affirmed.

MR. JUSTICE REED took no part in the consideration or decision of either of these causes.

TITUS *v.* WALLICK.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 188. Argued January 30, 1939.—Decided February 27, 1939.

1. The right to enforce in a state court a judgment recovered in a court of another State is one arising under Article IV, § 1 of the Constitution and under a statute of the United States, R. S. § 905; 28 U. S. C. § 687. Since the existence of this right depends upon the legal effect of the proceedings, and the validity of the judgment, in the State in which it was rendered, the rulings upon those matters by the court in which the judgment is sued upon are reviewable by this Court. P. 287.
2. By the law of New York, an assignment of a chose in action for the purpose of suit only and obligating the assignee to account for the proceeds to another enables the assignee to sue in his own name. P. 288.
3. This effect of an assignment in New York is not altered by adding to the assignment a power of attorney to bring the suit. P. 289.
4. After recovering a judgment as lawful assignee of the original cause of action the judgment creditor resisted a claim upon contract for a share of the judgment, made in another suit, by representing that his interest had been assigned to others before the contract and by concealing the fact that the cause of action

had been reassigned to him for purposes of suit before the action resulting in the judgment had been begun. *Held* not matter of defense in a suit to collect the judgment in another State because these circumstances did not impair the previous assignment of the cause of action or deprive the judgment creditor of the authority to maintain the suit, already conferred upon him by the reassignment. P. 290.

5. When a state court refuses credit to the judgment of a sister State because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this Court to decide. P. 291.
6. The Constitution, Article IV, § 1, requires that credit be given a money judgment recovered by the judgment creditor, as assignee of a civil cause of action, in another State, even though the forum might have declined to concede his right to sue as real party in interest if the suit had been brought there upon the original assigned claim. P. 291.

133 Ohio St. 612; 15 N. E. 2d 140, reversed.

CERTIORARI, 305 U. S. 585, to review a judgment of the court below, which dismissed, as involving no debatable constitutional question, an appeal from an intermediate appellate court of Ohio, which had affirmed a judgment against the present petitioner in his suit on a New York judgment.

Mr. Thomas I. Sheridan, with whom *Messrs. Aaron Frank* and *Lewis F. Glaser* were on the brief, for petitioner.

Mr. William M. Summer, with whom *Messrs. Joseph P. Tumulty, Sr., Joseph P. Tumulty, Jr.,* and *William J. Hughes, Jr.* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the Supreme Court of Ohio, by denying recovery upon a judgment procured by petitioner against respondent in the courts of New

York, has failed to accord to the New York judgment the full faith and credit which Article IV, § 1 of the Constitution commands.

Petitioner brought the present suit against respondent in the Ohio Court of Common Pleas upon a judgment recovered by petitioner against respondent in the Supreme Court of New York on May 1, 1934. Transcript of the New York judgment for $389,103, duly authenticated in conformity to the Act of Congress, R. S. § 905, 28 U. S. C. § 687, was filed with the petition in the Ohio court. Defenses interposed by respondent, so far as now material, were that petitioner was not the real party in interest in the Ohio suit and that the judgment had been procured in New York by fraud on the court and on respondent, in that petitioner was not the real party in interest entitled to assert the claim litigated in that suit as required by § 210 of the New York Civil Practice Act, and that petitioner, in procuring the judgment, suppressed and withheld that fact from respondent and the New York courts.

The Court of Common Pleas, after a trial without a jury, sustained these defenses and gave judgment for respondent, which the Ohio Court of Appeals for Franklin County affirmed, with an opinion in which it ruled that the judgment sustaining the defenses did not deny the New York judgment the full faith and credit required by the Constitution. Appeal to the Supreme Court of Ohio assigning as error the denial of full faith and credit to the New York judgment was dismissed on the ground that the case involved "no debatable constitutional question." 133 Ohio St. 612; 15 N. E. 2d 140. We granted certiorari, 305 U. S. 585, the constitutional question presented by the petition being of public importance and the federal right asserted having been ruled upon and denied by the highest court of the state. *Matthews* v. *Huwe*, 269 U. S. 262; *Tumey* v. *Ohio*, 273 U. S. 510, 515.

Petitioner brought the New York suit in December, 1925, alleging that he was the owner of a quarter interest in two hundred and fifty shares of the stock of an Ohio corporation which respondent here, the defendant there, had fraudulently appropriated to his own use. The relief sought was that respondent be directed to deliver to petitioner certificates of stock representing his interest in the corporation and to account for the dividends and earnings on the stock received by respondent. Respondent appeared personally and defended the suit. It was twice tried in the Supreme Court of New York and was five times before the Appellate Division of the Supreme Court, 222 App. Div. 17; 225 N. Y. S. 263; 227 App. Div. 789; 237 N. Y. S. 908; 235 App. Div. 662; 225 N. Y. S. 905; 240 App. Div. 818; 266 N. Y. S. 969; 244 App. Div. 789; 280 N. Y. S. 969, and once before the New York Court of Appeals, 260 N. Y. 519; 184 N. E. 75, which affirmed a judgment establishing the liability of respondent. An accounting, at the end of nine years of litigation, resulted in the final judgment sued upon, which was affirmed by the Appellate Division. 244 App. Div. 789; 280 N. Y. S. 969.

The present record discloses that after entry of this judgment London Wallick, a brother of respondent, brought suit in the Supreme Court of New York to recover from petitioner a share of the judgment pursuant to a contract alleged to have been entered into by him with London Wallick on or about November 23, 1925. In resisting a motion made in that suit for an injunction restraining petitioner from disposing of the judgment or its proceeds, petitioner prepared and filed an affidavit reciting that on or before November 23, 1925, he had informed London Wallick that he had already assigned his interest in the claim against respondent to his wife and to Walter Titus, his brother, and asserting that "it does

not lie within the jurisdiction of this court to now enjoin what has already been accomplished."

The assignment by petitioner and a later reassignment of the claim to him were introduced in evidence in the present suit. The assignment, dated March 31, 1924, purported to "sell, assign, transfer and set over unto" Walter Titus "any and all claims" which petitioner then had against respondent. The reassignment, described by its terms as an "Agreement," bears date December 1, 1925, prior to the suit brought by petitioner against respondent in New York. It recites that the earlier assignment was made upon an oral agreement that Walter Titus was to "use any funds that might be derived" from the claim to the two hundred and fifty shares of stock to pay certain indebtedness of petitioner and that petitioner "wishes to institute an action against" respondent "to recover said stock." It states that Walter Titus "does hereby sell, assign, transfer and set over" to petitioner "all his right, title and interest" in the claim and appoints petitioner his attorney to collect the claim. It further recites an agreement between the assignor and petitioner that the latter will turn over the proceeds of the claim to the assignor, who agrees, after paying the expenses of collection, to pay over one-half of the net recovery to petitioner's wife, to discharge certain indebtedness of petitioner, and to pay the balance to him.

The Ohio Court of Appeals disagreed with the conclusion of the trial court that petitioner's affidavit in the London Wallick suit conclusively established that petitioner had no interest in the claim prosecuted against respondent in New York. It held that his interest was to be ascertained by examination of the reassignment from Walter Titus to petitioner. But interpreting that document in the light of the New York law it concluded that the reassignment was no more than a power of attorney authorizing petitioner to collect the claim in behalf

of Walter Titus and did not operate as an assignment to vest any right or interest in petitioner upon which he could maintain suit in the New York courts. Upon examination of petitioner's affidavit indicating, as the court thought, that petitioner had construed the reassignment correctly as not transferring to him any right or interest in the claim against respondent, it accepted the affidavit as evidence that petitioner had fraudulently prosecuted the New York suit against respondent with knowledge that he was not entitled to maintain it. The court accordingly affirmed the judgment of the trial court denying recovery, on the ground that the New York judgment, impeachable there for the fraud, was to the same extent impeachable in Ohio.

By R. S. § 905, 28 U. S. C. § 687, enacted under authority of the full faith and credit clause, Article IV, § 1 of the Constitution, the duly attested records of the judgments of a state are entitled to "such faith and credit . . . in every court within the United States, as they have by law or usage in the courts of the State from which they are taken." The jurisdiction of the New York court over the subject matter and the person of respondent, established prima facie by the present record and duly authenticated record of the judgment, is not questioned. But respondent argues, as the state court held, that under the Constitution and Act of Congress the judgment is entitled to no more credit in Ohio than is accorded to it in New York and that in New York the judgment is impeachable for petitioner's fraud in prosecuting the suit, knowing that he had no interest in the cause of action sufficient to enable him to maintain it.

The right asserted by petitioner to have the New York judgment enforced in the courts of Ohio is one arising under the Constitution and a statute of the United States. And since the existence of the federal right turns upon the legal effect of the proceedings in New York and

the validity of the judgment there, the rulings on those points by the Ohio court are reviewable here. *Adam* v. *Saenger,* 303 U. S. 59, 64. While they involve questions of local law and are of a character such that this court ordinarily reëxamines them with deference after they have been passed upon by a state court, its determination cannot be accepted here as decisive if the constitutional command is to be observed, especially as the decision of the state court rests not on the law of its own state or matters peculiarly within its cognizance, but upon the law of another state which is as readily determinable here as in the courts of Ohio.

We do not stop to consider the question much discussed in brief and argument how far the full faith and credit clause precludes the defense that the judgment sued upon in one state was procured by fraud in another, for we think it plain that the present judgment is subject to no such infirmity. It is evident that no fraud was perpetrated on respondent or on the New York courts if the assignment of the claim to petitioner before he brought the suit in New York operated to vest him with such ownership or interest in the claim as would enable him to maintain the suit upon it there. If the assignment had that effect, the facts that it was given for the purpose of enabling petitioner to bring the suit, and that he was bound to account to a stranger to the suit for its proceeds, are immaterial, since neither the court nor respondent was prejudiced by petitioner's failure to disclose them.

Choses in action, with exceptions not now material, are made freely assignable by the New York statute. § 41, Personal Property Law (Consol. Laws, c. 41). Section 210 of the New York Civil Practice Act provides "Every action must be prosecuted in the name of the real party in interest, except that . . . a trustee of an express trust . . . may sue without joining with him the person

for whose benefit the action is prosecuted." By repeated decisions of the highest court of the State of New York it has long been settled that under these sections any form of assignment which purports to assign or transfer a chose in action confers upon the transferee such title or ownership as will enable him to sue upon it. This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor. *Allen* v. *Brown,* 44 N. Y. 228; *Meeker* v. *Claghorn,* 44 N. Y. 349; *Sheridan* v. *Mayor,* 68 N. Y. 30; *McCauley* v. *Georgia Railroad Bank,* 239 N. Y. 514; 147 N. E. 175; *Meyers* v. *Credit Lyonnais,* 259 N. Y. 399; 182 N. E. 61; *Banca C. I. Trust Co.* v. *Clarkson,* 274 N. Y. 69, 74; 8 N. E. 2d 281; *Brown* v. *Powers,* 53 App. Div. 251; 65 N. Y. S. 733; *Birdsall* v. *Read,* 188 App. Div. 46; 176 N. Y. S. 369.

Here the assignment, which in plain terms purported "to sell, assign, transfer and set over" the chose in action to petitioner, was sufficient under the New York statutes and authorities to give petitioner dominion over the claim for purposes of suit. In that respect its legal effect was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another. The Ohio court, placing emphasis on the presence of the power of attorney in the assignment, disregarded the words of assignment and gave to the instrument the more restricted effect of a power of attorney. While a power of attorney to sue, standing alone, does not under the New York law operate as an assignment to vest the attorney with such title or interest as will enable him to maintain the suit in his own name, *Spencer* v. *Standard Chemicals Corp.,* 237 N. Y. 479; 143 N. E. 651, the addition of the power to petitioner's assignment did not deprive it of its force and character as an assignment. The use of the power of attorney, once for historical reasons the indispensable

adjunct of every assignment of a chose in action, Ames, Lectures on Legal History, 210 *et seq.*, Williston on Contracts, Rev. Ed. §§ 405, 408, did not render the assignment ineffective merely because, by virtue of the statute, its presence is no longer necessary.

Even though petitioner was disingenuous in omitting to reveal the reassignment of the claim in his affidavit in the London Wallick suit, and even though there was fraudulent purpose in his failure to disclose that he still had some interest in the proceeds of the judgment to which London Wallick was asserting a claim, those circumstances did not impair the previous assignment of the claim to him or deprive him of the authority, already conferred by the reassignment, to maintain the suit. Whether petitioner's transactions with London Wallick gave the latter any equitable claim to the judgment or its proceeds does not appear, but in any case the existence of such collateral claims does not subject the judgment to impeachment by the judgment debtor. *Matter of Holden,* 271 N. Y. 212, 217; 2 N. E. 2d 631.

Respondent also urges that the Court of Appeals rested its affirmance of the judgment of the trial court on the ground that petitioner was not the real party in interest entitled to maintain the suit in Ohio, and that this is a non-federal ground adequate to support the judgment and is not reviewable here. While the court intimated that petitioner was not the real party in interest in Ohio, it evidently rested this conclusion upon its opinion that petitioner was not the real party in interest in the suit in New York. Its opinion states that if the assignment "transferred any such legal or equitable interest or both in his claim to the plaintiff [petitioner] as would entitle him to maintain an action in his own name in New York, then he was a proper party in interest there and a proper party in interest here."

When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this court to decide. *Huntington* v. *Attrill,* 146 U. S. 657, 684; *Kansas City Southern Ry.* v. *Albers Commission Co.,* 223 U. S. 573, 593; *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 415. So far as the court rested its decision on its view that the New York assignment conferred no right on petitioner to maintain the suit there, it is enough, as we have pointed out, that the petitioner was the real party in interest entitled to maintain the suit in New York. So far as Ohio might apply a different rule if the original cause of action were prosecuted in its courts, that fact is irrelevant to any issue now presented. The suit in Ohio was not upon the assigned cause of action but upon the judgment of which petitioner is the record owner. The suit upon it is upon a different cause of action from that merged in the judgment. *Milwaukee County* v. *White Co.,* 296 U. S. 268, 275. It is the judgment and not the cause of action which gave rise to it for which credit is claimed, and the constitutional mandate requires credit to be given to a money judgment rendered on a civil cause of action in another state, even though the forum would have been under no duty to entertain the suit on which the judgment was founded. *Christmas* v. *Russell,* 5 Wall. 290; *Fauntleroy* v. *Lum,* 210 U. S. 230; *Roche* v. *McDonald,* 275 U. S. 449; *Milwaukee County* v. *White Co., supra,* 277.

Even though the Ohio court might have declined to recognize petitioner as the proper party to sue upon the assigned claim, a suit upon a judgment of another state, by virtue of the Constitution, stands upon a different footing. The Ohio court is not free to withhold from petitioner, the record owner of a judgment valid and en-

forceable by him in New York, the full benefit of the constitutional command that the judgment shall receive in the courts of Ohio such faith and credit as it is entitled to receive in New York. A state which may not constitutionally refuse to open its courts to a suit on a judgment of another state because of the nature of the cause of action merged in the judgment, *Kenney* v. *Supreme Lodge, supra,* 415, obviously cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on the judgment.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* COLUMBIAN ENAMELING & STAMPING CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 229. Argued January 11, 12, 1939.—Decided February 27, 1939.

1. An order of the National Labor Relations Board requiring reinstatement of employees based on a finding that the employer, on a date specified, had refused to bargain with their Union, *held* invalid, the finding not being sustained by evidence. P. 296.
2. The National Labor Relations Act does not compel the employer to seek out his employees and request their participation in negotiations for purposes of collective bargaining, and he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees. P. 297.
3. Section 10 (e) of the Act in providing that the findings of the Board as to the facts, if supported by evidence, shall be conclusive, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can reasonably be inferred. P. 299.
4. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the

conclusion sought to be drawn from it is one of fact for the jury. P. 300.

96 F. 2d 948, affirmed.

CERTIORARI, 305 U. S. 583, to review a judgment refusing an application of the National Labor Relations Board for enforcement of one of its orders.

Mr. Robert B. Watts, with whom *Solicitor General Jackson,* and *Messrs. Charles A. Horsky, Charles Fahy, Laurence A. Knapp,* and *Mortimer B. Wolf* were on the brief, for petitioner.

Mr. Earl F. Reed, with whom *Messrs. Otto A. Jaburek* and *Charles M. Shorp, Jr.* were on the brief, for Columbian Enameling & Stamping Co., and *Mr. Paul R. Shafer* for Hiatt et al., respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This petition tests the validity of an order of the National Labor Relations Board of February 14, 1936, directing respondent to discharge from its service employees who were not employed by it on July 22, 1935; to reinstate, to the vacancies so created, those who were employed on that date and have not since received substantially equivalent employment elsewhere; and to desist from refusing to bargain collectively with Enameling and Stamping Mill Employees Union No. 19694 as the exclusive representative of respondent's production employees with respect to rates of pay, wages, hours, and other conditions of employment. Unless the finding of the Board that respondent had refused to bargain collectively with the Union on July 23, 1935, is sustained by the evidence, the order is invalid.

Pursuant to a charge lodged with it by the Union, the Board issued its complaint charging respondent with un-

fair labor practices affecting interstate commerce within the meaning of § 8 (1) and (5) of the National Labor Relations Act. 49 Stat. 449. After hearing, the Board made findings which, so far as now relevant, may be summarized as follows: Respondent corporation is engaged at Terre Haute, Indiana, in the manufacture and sale in interstate commerce of metal utensils and other products. On July 14, 1934, respondent and the Union entered into a written contract for one year, terminable on thirty days' notice, prescribing various conditions of employment. It provided that no employee should be discriminated against by reason of membership or non-membership in, or affiliation or non-affiliation with any union or labor organization. It also provided for arbitration, before an arbitration committee, of disputes arising under the contract, and that "There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration."

Between the date of the signing of the agreement, July 14, 1934, and March 23, 1935, respondent's officers held numerous meetings with representatives of the Union, usually the Union Scale Committee, for the consideration and adjustment of various demands of the Union. At a meeting on January 4, 1935, the committee presented a number of requests, among them the demand that respondent should discharge any employees who might be suspended by the Union. This and the other demands were rejected by respondent, and a later request that the demands of January 4th be arbitrated was likewise refused on the ground that they were not arbitrable under the agreement. The committee afterward presented new demands at other meetings and then at a meeting on March 11th renewed the demands of January 4th, which respondent again rejected. On March 17th the Union passed resolutions reciting grievances and demanding a closed shop, and on March 23rd ordered a

strike, when four hundred and fifty of respondent's five hundred employees left work. On March 30th respondent announced that its factory was closed indefinitely.

The strike was in effect July 5, 1935, when the National Labor Relations Act was approved, and continued until about July 23rd, when respondent resumed operations at its plant. By August 19th it had received three thousand applications for employment and had reëmployed one hundred and ninety of its production employees. By the end of the second week in September respondent had employed a full force. On July 23rd two labor conciliators from the Department of Labor appeared in Terre Haute and were requested by the Union "to try and open up negotiations with the respondent." On that day the conciliators met and conferred with respondent's president, who agreed to meet them with the Scale Committee. Several days later he informed them that he would not meet with them or with the Scale Committee. Later respondent received, but did not answer, letters of the Union of September 20th and October 11th, asking for a meeting to settle the controversy between them.

The Board concluded that on July 23rd the "union represented a majority of the respondent's employees, that it sought to bargain with the respondent, that the respondent refused to so bargain, and that this constituted an unfair labor practice" within the meaning of § 8, subdivision (5) of the Act. It ordered respondent to discharge all of its production employees who were not employed by it on July 22, 1935, to reinstate its employees as of that date, and thereupon to desist from refusing to bargain with the Union as the exclusive representative of respondent's production employees.

Application by the Board for a decree enforcing its order was denied by the Circuit Court of Appeals for the Seventh Circuit, 96 F. 2d 948, on the ground that as

the employees had struck before the enactment of the National Labor Relations Act, in violation of their contract not to strike and to submit differences to arbitration, they did not retain and were not entitled to protection of their status as employees under § 2 (3) of the Act. We granted certiorari, 305 U. S. 583, the questions presented with respect to the administration of the National Labor Relations Act being of public importance.

The Board's order is without support unless the date of the refusal to bargain collectively be fixed as July 23, 1935. The evidence and findings leave no doubt that later, in September, respondent ignored the Union's request for collective bargaining, but as at that time respondent's factory had been reopened and was operating with a full complement of production employees, the refusal to bargain could afford no basis for an order by the Board directing, as of that date, the discharge of new employees and their replacement by strikers. Restoration of the strikers to their employment, by order of the Board, under § 10 (c) of the Act, could as a practical matter be effected only if respondent had failed in its statutory duty to bargain collectively at some time after the approval of the National Labor Relations Act on July 5th, and before respondent had resumed normal operation of its factory. The date fixed by the Board was July 23rd, when respondent reopened its factory, and the occasion was the personal interview on that day and a later telephone conversation of respondent's president with the conciliators from the Labor Department, who were not members or official representatives of the Union and who, so far as the testimony discloses, did not then appear to the president to be authorized to speak for the Union.

In appraising these transactions between the conciliators and respondent's president, it is important to bear

in mind the nature and extent of the legal duty imposed upon the employer by the National Labor Relations Act. Section 8 (5) declares that it is an "unfair labor practice" for an employer "To refuse to bargain collectively with the representatives of his employees," and §§ 2 and 10 (c) give to the Board an extensive authority to order the employer to cease an unfair labor practice and to compel reinstatement of employees with back pay when employment has ceased in consequence of a labor dispute or unfair labor practice. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333. While the Act thus makes it the employer's duty to bargain with his employees, and failure to perform that duty entails serious consequences to him, it imposes no like duty on his employees. Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.

However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees, without violation of law and without suffering the drastic consequences which violation may entail. To put the employer in default here the employees must at

least have signified to respondent their desire to negotiate. Measured by this test the Board's conclusion that respondent refused to bargain with the Union is without support, for the reason that there is no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain or that respondent knew that they represented the Union. The employer cannot, under the statute, be charged with refusal of that which is not proffered.

During the eight months preceding the strike respondent had, upon request, entered into negotiations with the Union on some eleven different occasions. Such meetings, always with some known representatives of the Union, were customarily with the Union Scale Committee and on its written request. All negotiations were broken off by the Union by the strike which followed almost immediately its resolutions of March 17th. On July 23rd the strike had continued for about four months, accompanied by picketing, violence and destruction of property, and had culminated, on July 22nd, in a proclamation of martial law. A meeting on June 11th had resulted in no change of attitude on either side. From then until July 23rd no attempt appears to have been made on either side to resume negotiations.

While there was before the Board testimony of the secretary of the Union that on July 23rd he had asked the conciliators to "try and open up negotiations," there was no testimony that respondent or its officers had ever been informed of that fact or that they were advised in any way of the willingness of the Union to enter into negotiations. This was pointedly brought to the attention of the Board and the trial examiner by a motion to strike the testimony of the secretary and that of respondent's president, giving his account of his interview with the conciliators. But the conciliators were not called as witnesses and no attempt was made to supply the omission.

Respondent's president testified that on July 23rd the conciliators asked him if he would meet with them and the Scale Committee; that he replied that he would; that no meeting was arranged and that several days later he called one of the conciliators on the telephone and informed him that he, the witness, "would not have any meeting with him or with the Scale Committee." All else that took place between the conciliators and respondent is left a matter of conjecture.

This testimony, on which the Board relies to support its finding, shows on its face that there was no indication until sometime later than July 23rd of any unwillingness on the part of respondent's president to meet the Union. Furthermore, it contains no hint that the Union at any time after July 5th and before September communicated to respondent its willingness to bargain, or that the conciliators, in asking a meeting and discussing the matter with respondent's president, purported to speak for the Union. The testimony is consistent throughout with the inference, and indeed supports it, that the conciliators, so far as known to respondent, appeared in their official role as mediators to compose the long-standing dispute between respondent and its employees; that the employer first consented in advance to attend a meeting, and later withdrew its consent when they had failed for some days to arrange a meeting. Whether in the meantime the Scale Committee or any other representative of the Union was in fact willing to attend a meeting does not appear.

Section 10 (e) of the Act provides: ". . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive." But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, V. & M. Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142; *Consolidated Edison Co.* v. *National Labor Rela-*

tions Board, 305 U. S. 197; *Appalachian Electric Power Co.* v. *National Labor Relations Board,* 93 F. 2d 985, 989; *National Labor Relations Board* v. *Thompson Products Inc.,* 97 F. 2d 13; *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Board,* 98 F. 2d 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, 524; *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra,* 989.

Judged by these tests or any of them we cannot say that there was substantial evidence that respondent at any time between July 5, 1935, and September, 1935, was aware that the Union desired or sought to bargain collectively with respondent, or that there is support in the evidence for the Board's conclusion that on or about July 23, 1935 respondent refused to bargain collectively with the Union.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

The Labor Board was given jurisdiction by Congress to hear and weigh evidence and to determine the inferences from it; to make findings of fact; and to issue orders necessary to effectuate the purposes of the National Labor Relations Act. In apt language, Congress

limited the power of courts to review the Board's findings by providing in the Act that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive."

I believe that "The inferences to be drawn were for the Board and not the courts," [1] and that the inferences drawn by the Board were supported by the evidence. Courts should not—as here—substitute their appraisal of the evidence for that of the Board.

The Labor Board, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission and many other administrative agencies were all created to deal with problems of regulation of ever increasing complexity in the economic fields of trade, finance and industrial conflicts. Congress thus sought to utilize procedures more expeditious and administered by more specialized and experienced experts than courts had been able to afford. The decision here tends to nullify this Congressional effort.

The Labor Board concluded that "On or about July 23, 1935, the company refused to bargain collectively with the union as the representative of its employees, or at all, . . ." This conclusion is here set aside only because the Court believes the evidence before the Board did not support its particular underlying finding that "It seems clear that . . . [the] president of the respondent, knew that the union was seeking through the [federal] conciliators to bargain with the respondent with respect to the settlement of the strike."

Undisputed evidence disclosed that on July 23, 1935, the conciliators—at the express instance of the Union—conferred for three or four hours with the president of respondent; that the only purpose of the conciliators

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[1] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271.

was to arrange a meeting between the company and the Union in order to bring about collective bargaining; that the president agreed with the conciliators to meet the Union and the conciliators at a date to be set; but that several days thereafter (when the company had obtained other employees and was operating under the protection of the militia) the president—again acting for the company—called the conciliators and flatly refused to meet further with them or the Union. The Court finds only a single link missing in the chain of evidence showing that the company refused to bargain with the Union, i. e., that there was no evidence to justify the Board's finding that the president of the company was aware the conciliators had approached the company at the request of the Union. But the "courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of" an administrative body.[2] And the story in this record discloses a broad basis for the inference that the company did know it was actually refusing the Union's request.

For thirty-three years prior to July, 1934, the company ran a non-Union plant. About that date, a majority of the employees were organized by an affiliate of the American Federation of Labor. The company first refused to sign an agreement with the Union but did so, July 14, 1934, upon the intervention of the Regional Labor Board functioning under the National Industrial Recovery Act. This agreement was to continue a year, was subject to modification by mutual consent, and provided for arbitration of disputes arising under it. Thereafter, pursuant to the agreement, meetings were held between the Union and respondent and the Union submitted repeated re-

[2] *Federal Trade Comm'n* v. *Standard Education Society*, 302 U. S. 112, 117; *Federal Trade Comm'n* v. *Algoma Co.*, 291 U. S. 67, 73; cf., *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 314.

quests and grievances, relating to the "check-off" system, wage increases, the possibility of a closed shop, etc. These were refused and counter grievances of the company were submitted and discussed. In meetings and by mail, the Union continued to submit grievances—that back-pay accrued during shut-downs was owing, that the company was dealing with individual employees and, in March, 1935, that the company by refusing to arbitrate had broken its agreement. March 22, the Union called a strike, the testimony showing that it was called "on account of the company's refusal to honor and abide by the agreement signed before the Labor Board July 14, 1934 . . . [as to] minimum days, wages, and any employee being called out and not used" and because the company had "refused arbitration on this agreement." Thereafter, the company closed its plant, consistently urged individual members of the Union to return to work and desert the Union's efforts—by strike—to obtain collective bargaining, and publicly announced that it would not meet with the members of the Union and that it was willing to take its individual employees back, but "without Union recognition or agreement." June 11, the company did meet with the Union's representatives but insured the impossibility of any successful collective bargaining by reiterating at the outset that the company would not recognize the Union. July 23, the Union asked the conciliators to see the president of the company.

To conclude that the company—through its president—was unaware the conciliators were acting at the instance of the Union, and, therefore, is not to be held responsible for its flat refusal to meet with its employees, is both to ignore the record and to shut our eyes to the realities of the conditions of modern industry and industrial strife. The atmosphere of a strike between an employer and employees with whom the employer is familiar does not

evoke, and should not require, punctilious observance of legalistic formalities and social exactness in discussions relative to the settlement of the strike. It is difficult to imagine that—during several hours of conversation between the conciliators and the company's president concerning a future meeting of Union and company—the conciliators refrained from reference to the Union's request that the conciliators arrange such a future meeting. In a realistic view, the company's statement of July 23 to the conciliators, that it would meet with them and the Union, clearly indicated the company's acceptance of the fact that the conciliators were appearing for the Union. The company's declaration to the conciliators, several days later, that it would not meet with the Union or the conciliators, equally represents the company's recognition and acceptance of the fact that the conciliators were a means of dealing with the Union.

Not only did the Labor Board find the evidence sufficient to show that the company refused to bargain with the Union on or about July 23, but the court below reached the same conclusion. The rule is well settled that findings of fact concurred in by two lower courts will not "be disturbed unless plainly without support." [3] This rule equally applies when an administrative body and a lower court—as here—concur on findings of fact,[4] and the rule is even more persuasive where, as in the Act creating the Labor Board, it is provided that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." The majority opinion [5] of the Court of Appeals in this case said:

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[3] *General Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 178; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 542.

[4] *Illinois Central R. Co.* v. *Interstate Commerce Comm'n*, 206 U. S. 441, 466.

[5] Three judges sat in the court below. One wrote the opinion for the majority; the second judge concurred in the conclusion of that opin-

"This conclusion [refusal to enforce the Board's action] does not mean that we approve or uphold the refusal of the respondent to meet the request of the conciliators and enter into negotiations looking toward the settlement of disputes after the employees had quit their employment. Respondent's employees were largely unionized. Under the Act, respondent, when requested to negotiate, was in duty bound to do so. National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1. Instead it lent a friendly ear to unwise counsel wholly out of sympathy with the legislation designed to avoid and settle capital-labor disputes. It erred in its refusal to respect the law and . . . [ignored] the request of those charged with the burdensome task of working out a peaceful solution of what had become a bitter controversy. There is little or no explanation which we can find for their refusal, save an open, defiant, flouting of the law of the land."

Respondent's striking employees remained employees—while on strike—within the meaning of the National Labor Relations Act (§ 2 (3)) because their work had ceased "as a consequence of . . . [and] in connection with . . . [a] current labor dispute. . . ." The statutory rights of these striking employees could not be destroyed, and respondent could not commit unfair labor practices and then escape liability by reopening the plant with a full complement of non-Union men.

Second. The court below was of opinion that the strike of March 22, 1935, violated the particular provision of the July 14, 1934, contract[6] with the company that

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ion; the third judge dissented but expressly found that there was evidence to support the findings that the company refused to bargain collectively with its employees.

[6] "In any case in which a satisfactory settlement of a dispute arising under this contract cannot be reached, such dispute shall be referred to a Committee of Arbitration composed of two persons

"There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration." Solely because it believed the Union had violated its contract, the court below declined to enforce the Board's order, and held that the company could not be made responsible for its own violation of the Act.

In this, I believe the court below was in error. A disagreement over the terms of a contract governing employer-employee relations is a labor dispute within the terms of the Act. Such a disagreement can—as it did here—produce industrial strife which the Act was expressly designed to prevent. Had Congress provided that violation of a private contract would deprive employees and the public of the benefits of the law, a different question would be presented. But Congress did not so provide and, in addition, the Union did not violate its contract. It contracted not to strike "pending decision by the Committee of Arbitration" but there was no decision "pending." There was no arbitration pending because the company would not arbitrate. If the contract was broken, it was the company—not the Union—that broke it.

I believe the judgment of the court below should be reversed and that the Board's order should be enforced.

MR. JUSTICE REED joins in this dissent.

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selected by the Management, two persons selected by the Union, and fifth person to be selected by these four, who shall reach a decision which shall be final and binding upon both parties to this contract. There shall be no stoppage of work by either party to this contract, pending decision by the Committee of Arbitration."

Syllabus.

TAYLOR ET AL., INDEPENDENT COMMITTEE, *v.* STANDARD GAS & ELECTRIC CO. ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 312. Argued January 5, 1939.—Decided February 27, 1939.

1. Appraisal of the property of a corporation undergoing reorganization under § 77B of the Bankruptcy Act—*accepted* by this Court in view of concurrent findings of two courts below and substantial evidence sustaining their findings. P. 314.
2. The so-called instrumentality rule is but a convenient way of designating the application, in particular circumstances, of the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice. This principle has been applied in appropriate circumstances to give minority stockholders redress against wrongful injury to their interests by a majority stockholder. P. 322.
3. A provision new in bankruptcy legislation, with respect to the standing of stockholders in corporate reorganization, is found in § 77B (b) of the Bankruptcy Act, which enacts that a plan of reorganization "may include provisions modifying or altering the rights of stockholders generally, or any class of them, either through the issuance of new securities of any character or otherwise." P. 322.
4. Section 77B of the Bankruptcy Act authorizes the court, as a court of equity, to recognize the rights and status of the preferred stockholders of a bankrupt corporation arising out of the wrongful and injurious conduct of a controlling corporation in the mismanagement of the bankrupt's affairs. P. 322.
5. A parent corporation with complete control of a subsidiary grossly mismanaged its affairs through many years and, according to the accounts between them, became its creditor in an enormous sum. Meanwhile, the preferred stockholders of the subsidiary had no voice in its management because the charter denied them voting power so long as dividends were paid them, and because the dominant corporation caused the subsidiary, notwithstanding its precarious condition, to pay such dividends when due. In a reorganization proceeding under § 77B of the Bankruptcy Act, the District Court approved a compromise of the parent company's

claim, and on that basis approved a plan of reorganization involving formation of a new successor corporation, discharge of other obligations, and satisfaction of the compromised claim by awarding to the parent company a large majority of the new company's common stock, thus continuing its complete control, but allowing only a minority of such stock to the old preferred stockholders. *Held:*

(1) That the District Court abused its discretion in not rejecting the compromise and the plan of reorganization. Pp. 309, 323.

(2) If a reorganization is effected, the amount at which the parent company's claim is allowed is not important if it is to be represented by stock in the new company, provided the stock to be awarded it is subordinate to that awarded preferred stockholders of the bankrupt. P. 324.

(3) No plan ought to be approved which does not accord such preferred stockholders a right of participation in the equity in the assets prior to that of the parent company, and at least equal voice with that company in the management. *Id.*

96 F. 2d 693, reversed.

CERTIORARI, 305 U. S. 584, to review the affirmance of a judgment of the District Court approving a plan of reorganization under § 77B of the Bankruptcy Act.

Mr. Jason L. Honigman for petitioners.

Mr. Nathan A. Gibson, with whom *Messrs. Wilbur J. Holleman, A. Louis Flynn,* and *Jacob K. Javits* were on the brief, for Standard Gas & Electric Co.; *Mr. James F. Oates, Jr.,* with whom *Mr. William P. Sidley* was on the brief, for the Reorganization Committee; and *Mr. George S. Ramsey,* with whom *Mr. Villard Martin* was on the brief, for Greis, Trustee, respondents. *Mr. W. F. Semple* submitted for Deep Rock Oil Corp., respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question presented is whether the District Court abused its discretion in approving the compromise of a claim by a parent against a subsidiary corporation and a

plan of reorganization based upon the compromise, in proceedings under § 77B of the Bankruptcy Act.[1] The Circuit Court of Appeals, by a divided court, approved the District Court's order.[2]

The petitioners are a committee for the protection of preferred stockholders. The respondents are the trustee of the debtor, Deep Rock Oil Corporation (a Delaware corporation whose business was that of producing, refining, and selling gasoline, oil, and other petroleum products, from lands located in Oklahoma, Kansas, Texas, and Arkansas), a reorganization committee, representing noteholders and certain holders of preferred stock, and Standard Gas and Electric Company, which owns practically all of the common stock of the debtor, claiming as a creditor.

The debtor was organized in 1919 to take over the properties then being operated by one C. B. Shaffer.[3] Standard Gas & Electric Company, hereinafter called Standard, then had investments in various utility properties but had never been interested in oil. Byllesby & Company, hereinafter called Byllesby, an investment banking corporation which controlled Standard, entered into a contract with Shaffer whereby he was to organize the debtor corporation and to be paid by that corporation for his properties $15,580,000 made up of cash, a note, and preferred and common stock of the company. Byllesby agreed to purchase $11,000,000 par value of first mortgage bonds of an authorized issue of $15,000,000, $5,000,000 par value of preferred stock, and 120,000 shares of common stock, par $1, for $15,200,000 in cash, to be applied by the company to the cash payments to be made to Shaffer and for working capital.

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[1] U. S. C., Tit. 11, § 207.

[2] *Taylor* v. *Standard Gas & Electric Co.*, 96 F. 2d 693.

[3] The corporate name was Shaffer Oil & Refining Company. This was changed in 1931 to Deep Rock Oil Corporation. The company will be referred to by the latter name.

Shaffer received for the properties turned over by him 80,000 shares of common stock, 50,000 shares of $100 par preferred stock, $9,500,000 in cash and a note of Byllesby and Standard for $1,000,000. In fact $12,000,000 of the first mortgage bonds were underwritten by a syndicate formed by Byllesby and sold to the public. The result of the above transactions was to leave Deep Rock with approximately $6,700,000 of cash. Shortly thereafter the remaining $3,000,000 of bonds were pledged to secure Deep Rock's notes for $2,000,000. From its organization Deep Rock was, most of the time, "two jumps ahead of the wolf," as one of Standard's officers testified. The common stock went into a voting trust which gave Standard and Shaffer equal control. Shaffer undertook the management of the properties and business. After two years Standard became dissatisfied with Shaffer's management and he severed his connection with the company selling his common stock to Standard and surrendering to Deep Rock 50,000 shares of preferred stock which was cancelled.

Thenceforward the debtor was under the complete control and domination of Standard through ownership of the common stock. Standard's officers, directors, and agents always constituted a majority of the Board. The remaining directors were operating officers or employes of Deep Rock who had been employed on behalf of Deep Rock by Standard or the Byllesby Management Corporation, hereafter called Management Corporation, a wholly owned subsidiary of Standard, or were under the complete control of Standard. A majority of Deep Rock's officers were officers or directors of Standard or of the Management Corporation, or of both. The officers of the debtor, who were chosen for their technical or business experience in the oil industry, although allowed some discretion in the matter of development and operation of the oil properties, reported to and were always subject to the direction of officers and directors of Standard. All

of the fiscal affairs of the debtor were wholly controlled by Standard, which was its banker and its only source of financial aid.

Deep Rock was placed in the hands of a receiver in March 1933 and the present proceeding under § 77B of the Bankruptcy Act was instituted in June 1934. Standard filed a claim as a creditor in the receivership and in the bankruptcy proceedings, which the receivers and the trustee resisted. The claim was referred to a master, before whom trial lasted many months. All the witnesses were officers, directors or agents of Standard, or its affiliates, and officers of the debtor. All the documentary evidence came from the books and records of Standard and Deep Rock. The basis of claim was an open account which embraced transactions between Standard and Deep Rock from the latter's organization in 1919 to the receivership in 1933. The account consists of thousands of items of debit and credit. The book entries were made under the direction of Standard's auditing department, which supervised the auditing department of Deep Rock, and it is not surprising, therefore, that the books of the two companies agree with respect to all items.

The account contains debits to Deep Rock in excess of $52,000,000 and credits of approximately $43,000,000 leaving a balance shown to be due Standard of $9,342,-642.37, which was the amount of the claim presented. Cash payments by Standard to Deep Rock, or to others for its account, as shown by the books, total $31,804,-145.04. Management and supervision fees paid or credited to Management Corporation amount to $1,219,-034.83. Interest charges by Standard to Deep Rock on open account balances total $4,819,222.07. Rental charges upon a lease to Deep Rock of oil properties owned by a Standard subsidiary but claimed by petitioners to belong, in equity, to Deep Rock, amount to $4,525,000.

Debits by Standard to Deep Rock of the amounts of dividends declared by Deep Rock to Standard, but not paid, reached the sum of $3,502,653. In addition there are hundreds of debits and credits representing other intercompany items.

Two preferred stockholders were permitted to intervene in the proceedings and they joined in the trustee's objections to the claim. Many transactions entered in the account were attacked as fraudulent and it was asserted that as Standard had made Deep Rock its mere agent or instrumentality it could not transmute itself from the status of the proprietor of Deep Rock's business to that of creditor. The hearings before the master were closed, but before he made any report, and as a result of negotiations initiated by the reorganization committee organized at the instance of Byllesby, representing approximately eighty-two per cent. of the noteholders and sixty per cent. of the preferred stockholders of Deep Rock, Standard proposed a compromise of its claim.

The court referred the proposal to the master who reported favorably. The trustee and his counsel also recommended the approval of the compromise, which involved the allowance of Standard's claim at $5,000,000. In contemplation of the approval of this compromise a reorganization of Deep Rock was proposed by the reorganization committee. The plan was based upon the trustee's appraisal of the debtor's assets at $16,800,000, of which $7,300,000 represented net current assets, mainly cash, and the remainder comprised fixed assets valued at $9,500,000. It provided that upon approval of the compromise of Standard's claim, the reorganization would be effected by the formation of a new company which would take over the debtor's assets and would issue $10,000,000 par value of fifteen year six per cent. income debentures which were to go to the holders of the debtor's unpaid notes of like amount; 25,000 shares of $7 cumu-

lative preferred stock and 520,000 shares of no par common stock, of which the entire preferred stock and 390,000 shares of common should go to Standard on account of its claim, 80,000 shares of common to the noteholders, and 50,000 shares of common to the preferred stockholders of the old company. Standard's claim to the extent of $3,500,000 was to stand on a parity with the debtor's notes.

In the District Court the petitioners insisted that as the testimony before the master had been closed he should be required to pass upon the provability of Standard's claim and no reorganization plan should be considered until the validity of the claim had been adjudicated. The court, without passing on this demand, refused to approve the compromise or the plan of reorganization. Referring to the 50,000 shares of preferred stock outstanding, the judge stated that somebody had received the money represented by this stock from the public; that the plan in effect wiped out preferred stockholders and that he could not approve any plan which had this effect. In the course of the hearing he stated: "The evidence is overwhelming that Standard ran this company; they officered it; they capitalized it; it is just a child in their hands, and if there ever was a case the law is clear on, it is nothing but an instrumentality, according to the admissions." He indicated, however, that he would approve a plan according Standard a parity with the noteholders for a smaller proportion of its claim allowing the balance on a parity with the preferred stockholders, and suggested that the parties negotiate further in an effort to reach a fair result.

Months later the reorganization committee presented an amended plan which, as modified by the Court, contemplated the compromise of Standard's claim at $5,000,000, as before, and the organization of a new company which should issue $10,000,000 par value of deben-

tures and 520,000 shares of common stock. These securities were to be distributed as follows: The new issue of debentures was to go to the holders of the old notes. In lieu of interest on the old notes accumulated to January 1, 1937, totaling $2,300,000, the noteholders were to receive $1,200,000 in cash and 40,000 shares of common stock; interest accruing subsequent to January 1, 1937, was to be paid in cash. The old preferred stockholders were to receive 100,000 shares of common stock and Standard was to receive for its claim 380,000 shares of common stock. Thus there was allocated to Standard approximately seventy-three per cent., to the old preferred stockholders nineteen per cent., and to the noteholders eight per cent. of the common stock. The District Court permitted the petitioners to intervene and, over their objections, approved the compromise and the plan. A majority of the Circuit Court of Appeals examined the record only to the extent of determining that it was possible that Standard might establish its claim in whole or in part, and concluded that the District Court had not exceeded the bounds of reasonable discretion in granting its approval. One judge thought that the instrumentality rule was applicable; that, under the rule, Standard had no provable claim; and that it was an abuse of discretion to approve the compromise and the reorganization plan. We agree with the conclusion of the dissenting judge, but for different reasons.

The petitioners insist that the appraisal upon which the plan was based was inordinately low and that, for this reason alone, the plan should not have been approved. The appraisal was supported by substantial evidence and the values shown by it were approved and adopted by the District Court and by the Circuit Court of Appeals. We accept the concurrent findings of the two courts that the value of the debtor's assets does not exceed $17,000,000.

As the debentures to be issued to the noteholders, plus the cash they are to get, total $11,200,000, the equity remaining in the property is not over $5,800,000. Standard's share of this equity will be seventy-three per cent., or $4,234,000, and will give it complete control of the new company. The preferred stockholders will receive nineteen per cent. or $1,020,000,—a minority interest without representation on the board of directors. The question is whether, within the bounds of reason and fairness, such a plan can be justified. We think the history of Standard's dealings with Deep Rock requires a negative answer.

Without going into the minutiæ of the transactions between the two companies, enough may be stated to expose the reasons for our decision. As has been stated, Standard came into complete control of Deep Rock in 1921. From the outset Deep Rock was insufficiently capitalized, was topheavy with debt and was in parlous financial condition. Standard so managed its affairs as always to have a stranglehold upon it.

At organization Deep Rock had cash working capital of only about $6,600,000 and a mortgage indebtedness of $12,000,000, the interest and sinking fund requirements of which were nearly $2,000,000 a year. Its assets at that time were appraised at about $16,000,000. Shortly thereafter it created a further note issue of $2,000,000. Upon the acquirement of Shaffer's interest, in 1921, Standard caused Deep Rock to issue short term notes of a part of $3,500,000. Deep Rock also, between 1921 and 1924, borrowed substantial sums on promissory notes some of which were discounted or subsequently taken up by Standard. So inadequate was Deep Rock's capitalization that, in the period from organization to 1926, the balance due on open account to Standard grew to more than $14,800,000. Standard determined to place some of this indebtedness of Deep Rock with the public. In order to do so it had to

improve Deep Rock's balance sheet. This it did by purchasing 80,000 shares of preferred stock for which it credited Deep Rock $7,223,333.33. It then bought $7,500,000 face value two year six per cent. notes for $7,273,750, which were sold to the public through a syndicate organized by Byllesby. Deep Rock's requirements of additional capital persisted and, by the spring of 1928, the open account and a note which Deep Rock had given Standard for advances totaled over $11,000,000. As the two-year notes held by the public were maturing, Standard found it necessary to make a new offering. There still remained nearly $2,000,000 of first mortgage bonds outstanding which had to be retired to make an unsecured note issue salable. Standard, therefore, determined that Deep Rock's balance sheet must again be put in such shape that notes could be sold. It accordingly purchased common stock from Deep Rock to the amount of the then open balance and commuted 90,000 shares of the preferred stock, which it held, into common. It caused Deep Rock to issue $10,000,000 of six per cent. notes which were sold by a syndicate organized by Byllesby and applied the proceeds to the redemption of the two-year notes and the outstanding mortgage bonds. This financing, however, merely changed the character of Deep Rock's funded indebtedness and gave it no new working capital. This $10,000,000 note issue is the one now outstanding. As before, Deep Rock's resources were wholly insufficient for its business and the open account began again to build up so that between February 1928 and February 1933, the date of receivership, the account had grown to $9,342,642.37.

No dividends were paid on preferred stock until 1926. In that and the following year existing arrearages were paid by Standard, for Deep Rock's account, in the amount of $1,435,813. Between 1928 and 1931 Standard advanced Deep Rock, for payment of preferred dividends, $1,106,706.

During the period between 1926 and 1929 Deep Rock declared dividends on its common stock in a total of $3,064,685.50. Of these dividends $1,946,672 was charged by Standard, as owner of common stock, against Deep Rock in the open account. Standard took new common stock for dividends to the amount of $1,015,437.50 and advanced Deep Rock cash to pay dividends to outside holders of common stock in the sum of $102,576. Against the total of $2,645,095 advanced by Standard to pay Deep Rock's dividends, Standard credited payments received from Deep Rock in the open account in the sum of $927,500.

These dividends were declared in the face of the fact that Deep Rock had not the cash available to pay them and was, at the time, borrowing in large amounts from or through Standard.

About 1922 Standard decided that, in view of the unsatisfactory progress of Deep Rock, earnings must be increased by the acquisition of additional oil properties and by the erection of a modern gasoline cracking plant. Upon recommendation of the operating officials, Standard decided that Deep Rock should purchase the so-called Bradstreet properties, the price of which was $650,000. Of this amount $500,000 was advanced by Standard for account of Deep Rock and $150,000 paid by notes of Deep Rock. Title to the property was taken in the name of J. C. Kennedy, an employee of Deep Rock, as trustee. Kennedy never executed any declaration of trust. Deep Rock charged against him not only the original purchase price of the Bradstreet properties but the moneys thereafter expended in their development and in the acquisition of additional leases, amounting, to October 1, 1925, to $1,033,294.32, much of which represented advances by Standard.

In 1922 Deep Rock conveyed a small portion of its land to R. J. Graf, a Standard official, as trustee. Upon this land Deep Rock erected a new cracking plant at a

total cost of $861,297.79. This expenditure was charged to R. J. Graf, trustee. Again part or all of the sums so expended were advanced by Standard to Deep Rock and charged against the latter.

In 1922 Standard had caused a company to be formed in Delaware known as Deep Rock Oil and Refining Company, intending that it should take title to the Bradstreet properties and the cracking plant. The purpose, as Standard's officers now state, was to keep these assets from going into direct ownership of Deep Rock and thus coming under the lien of its mortgage, so that they could be used as the basis of additional financing. The records of the Refining Company show that its capital stock was issued against the transfer by Kennedy and Graf as trustees of the Bradstreet and cracking properties but there are no corporate records of Deep Rock or of Standard concerning any actual transfer and no book entries of Deep Rock or Standard were made concerning the supposed transfer until December 1925, as of October 1, 1925. At that time, by direction of one Brahaney, the chief accounting officer of Standard, entries were made in Standard's books and those of Deep Rock to evidence the following transaction: Standard assumed the advances made by Deep Rock for improvement of the Bradstreet properties and the cracking plant totaling $1,894,592.11 by crediting Deep Rock with that sum and Refining Company gave its note to Standard in that amount. Deep Rock also credited Kennedy, Trustee, with the $650,000 paid for the Bradstreet properties and Standard assumed this charge. The entire capital stock of Refining Company, evidencing equity ownership in the Bradstreet properties and the cracking plant, was transferred to Standard. Thus, on the face of things, Standard, through ownership of the capital stock of Refining Company, owned and controlled the Bradstreet properties and the cracking plant and put itself in such a position that, without its continued coöperation, Deep Rock could not function.

As at October 1, 1925, but in fact somewhat later, at the dictation of Standard's officials, a lease was executed by the Refining Company to Deep Rock covering the properties in question whereby Deep Rock should, for the first three months, pay $75,000 per month and, for the ensuing four and three-quarters years, pay $50,000 a month to Refining Company as rental. Such rental as was paid by Deep Rock was at once declared by Refining Company as a dividend to Standard and such as was not paid was debited to Deep Rock by Standard in the open account. Under this lease, which expired October 1, 1930, Deep Rock paid, or became obligated to Standard in the total of $3,075,000. During the term of the lease the operations of the leased properties showed a net loss of $30,401.40. The lease further provided that Deep Rock, at its own cost, should make all improvements and additions to the leased property, should make good all depreciation and return the property in the same condition as when leased. Additions to the cracking plant cost Deep Rock, during the term $264,680.51; and there were charged against Deep Rock in alleged fulfilment of its obligations under the lease, taxes of Refining Company and other items amounting to $192,415.91. Meantime, in two letters written bankers in connection with the sale of notes of Deep Rock, the president of Deep Rock, who was also president of Standard, made statements, and warranted their truth, to the effect that Deep Rock owned these leased properties.

In spite of the losses entailed upon Deep Rock by the lease arrangement, Standard dictated its renewal for another term of five years commencing October 1, 1930, and from that date to the receivership Deep Rock paid, or was debited by Standard with, $1,450,000, as rental and suffered, in the operation of the properties leased, a total loss of $1,584,458.05. During the combined terms of the two leases Deep Rock was charged in the open account

for Standard's subsidiary management corporation in payment of managerial, engineering, and financial advice, $1,020,000.

Immediately after the last and presently outstanding note issue was sold to the public Standard's annual report, for the first time, disclosed its claim to the ownership of the Refining Company properties. At the date of the receivership Standard claimed it owned the Refining Company's properties through stock ownership, and held its note in the amount of $1,894,592.11. The trustee in bankruptcy attacked this transaction as fraudulent and asserted Deep Rock's ownership of all the property represented by the Refining Company's stock free of any indebtedness to Standard in respect of it.

During the whole period from 1919 to the receivership, Standard charged Deep Rock interest at the rate of seven per cent. per annum compounded monthly on the balance shown by the open account. During the entire period the Management Corporation charged Deep Rock with round annual sums for management and supervision of Deep Rock's affairs which totaled $1,219,034.83, all of which Standard assumed and charged into the open account.

It is impossible within the compass of this opinion to detail the numerous other transactions evidenced by the books of the two companies many of which were to the benefit of Standard and to the detriment of Deep Rock. All of them were accomplished through the complete control and domination of Standard and without the participation of the preferred stockholders who had no voice or vote in the management of Deep Rock's affairs.[4]

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[4] At no time did the charter confer voting power on preferred stockholders, except in case and so long only as the company should be in default in payment of dividends on the preferred for a period of more than six months. At no time did Standard have less than a majority of the voting stock outstanding.

The suggested basis of compromise of Standard's claim needs comment. As has been said, when, in 1928, it became necessary to refinance Deep Rock's note obligations, Standard had to wipe out the enormous and threatening credit balance in its favor on Deep Rock's books. It, therefore, took common stock in payment of the balance. It is said that the compromise figure is reached by disregarding all transactions prior to February 24, 1928, when Standard commuted its then claim, starting fresh from that date, and considering only the items in the account thenceforward to the date of receivership. It is asserted that, during the period in question, Standard paid out, for account of Deep Rock, in cash, $6,850,971.50 and credited Deep Rock against these expenditures $4,475,803.59, leaving a balance of cash advanced of $2,375,167.91, as to which there can be no question; the Bradstreet properties and the cracking plant are to be returned to Deep Rock's ownership by transfer of the stock of the Refining Company and its note now held by Standard. It is asserted that in consideration of this transfer Deep Rock ought to assume the original cost of the Bradstreet properties advanced by Standard ($650,000), plus the amount of the disbursements by Deep Rock upon those properties which Standard had credited to Deep Rock when it took over the Refining Company stock ($1,894,592.11), less rentals charged by the Refining Company to Deep Rock prior to February 24, 1928, which rentals had been absorbed in the settlement by Standard of February 24, 1928 ($1,475,000). This leaves Deep Rock owing on the Bradstreet and cracking plant accounts $1,585,485.18. Simple interest at five per cent. is to be allowed on each of the two sums so ascertained. This brings the claim to approximately $5,000,000. It is said that this computation of the claim eliminates debits to Deep Rock made since 1928 for the fees of Management Corporation, for dividends on pre-

ferred and common stock held by Standard, and for every other questionable item; and that there can be no just criticism of the recognition of Standard's claim in the amount represented by the compromise offer.

Petitioners invoke the so-called instrumentality rule,—under which, they say, Deep Rock is to be regarded as a department or agent of Standard,—to preclude the allowance of Standard's claim in any amount. The rule was much discussed in the opinion below. It is not, properly speaking, a rule, but a convenient way of designating the application in particular circumstances of the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice. This principle has been applied in appropriate circumstances to give minority stockholders redress against wrongful injury to their interests by a majority stockholder.[5] It must be apparent that the preferred stockholders of Deep Rock assert such injury by Standard as the basis of their attack on the decree below. We need not stop to discuss the remedy which would be available to them if § 77B of the Bankruptcy Act had not been adopted for we think that, by that section, the court, in approving a plan, was authorized and required, as a court of equity, to recognize the rights and the status of the preferred stockholders arising out of Standard's wrongful and injurious conduct in the mismanagement of Deep Rock's affairs.

The section contains a provision new in bankruptcy legislation with respect to the standing of stockholders in corporate reorganization. Subsection (b) provides: "A plan of reorganization . . . (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new

[5] Compare *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483.

securities of any character or otherwise; . . ." In the present case there remains an equity after satisfaction of the creditors in which only the preferred stockholders and Standard can have an interest. Equity requires the award to preferred stockholders of a superior position in the reorganized company. The District Judge, we think, properly exercised his discretion in refusing to approve the first offer of compromise and concomitant plan because it partly subordinated preferred stockholders to Standard. The same considerations which moved him to reject that plan required the rejection of the new offer and the amended plan.

Deep Rock finds itself bankrupt not only because of the enormous sums it owes Standard but because of the abuses in management due to the paramount interest of interlocking officers and directors in the preservation of Standard's position, as at once proprietor and creditor of Deep Rock. It is impossible to recast Deep Rock's history and experience so as even to approximate what would be its financial condition at this day had it been adequately capitalized and independently managed and had its fiscal affairs been conducted with an eye single to its own interests. In order to remain in undisturbed possession and to prevent the preferred stockholders having a vote and a voice in the management, Standard has caused Deep Rock to pay preferred dividends in large amounts. Whatever may be the fact as to the legality of such dividends judged by the balance sheets and earnings statements of Deep Rock, it is evident that they would not have been paid over a long course of years by a company on the precipice of bankruptcy and in dire need of cash working capital. This is only one of the aspects in which Standard's management and control has operated to the detriment of Deep Rock's financial condition and ability to function. Others are apparent from what has been said and from a study of the record.

If a reorganization is effected the amount at which Standard's claim is allowed is not important if it is to be represented by stock in the new company, provided the stock to be awarded it is subordinated to that awarded preferred stockholders. No plan ought to be approved which does not accord the preferred stockholders a right of participation in the equity in the Company's assets prior to that of Standard, and at least equal voice with Standard in the management. Anything less would be to remand them to precisely the status which has inflicted serious detriment on them in the past.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

UNITED STATES *v.* TOWERY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 360. Argued January 31, 1939.—Decided February 27, 1939.

1. Benefits payable to the insured under a war risk term insurance contract on account of total and permanent disability do not cease after 240 monthly installments, but are continued for life if the disability lasts so long. P. 328.
2. Section 19 of the World War Veterans' Act of 1924, as amended by Act of July 3, 1930, bars suits on yearly renewable term insurance unless brought "within six years after the *right* accrued for which the claim is made," or within one year after the date of the amendatory Act, whichever is the later date; and provides that for the purposes of the section "it shall be deemed that the right accrued on the happening of the *contingency* on which the claim is founded." *Held*, there is but one "right" contemplated by the section, namely, the right to benefit payments; and but one critical "contingency" which conditions that right, namely, the occurrence of permanent total disability or death while the policy remains in force. Pp. 329, 331.

Congress did not intend to accord each of the claimants of possible benefits under the policy six years from the time any installment or lump sum payment fell due within which to bring suit. The interest of a beneficiary under the policy is derivative from that of the veteran.

The purpose of the 1930 amendment of § 19 was to substitute a uniform rule of limitation for suits on contracts of war risk insurance in lieu of the periods prescribed by the state statutes, which, pursuant to the Conformity Act, had theretofore been applied, and which periods varied from three to twenty years.

3. Insured under policies of war risk term insurance was discharged from military service in 1919; paid no further premiums; and died in 1927. Alleging the occurrence of disability on the date of discharge, claim was made in 1932 for disability and death benefits and denied by the Veterans Administration in 1935. Suit was instituted in 1936. *Held,* barred by limitations. Pp. 326, 329.

97 F. 2d 906, reversed.

CERTIORARI, 305 U. S. 588, to review the reversal of a judgment dismissing a suit upon two policies of war risk term insurance.

Mr. Wilbur C. Pickett, with whom *Solicitor General Jackson,* and *Messrs. Julius C. Martin, Fendall Marbury,* and *W. Marvin Smith* were on the brief, for the United States.

The six-year limitation began to run against the suit to recover installments of total permanent disability benefits under a contract of war risk term insurance not on the date as of which each installment of such benefits accrued, but as of a date not later than the last day the insurance was in force by premium payments.

The same limitation provision began to run against the suit of the respondent as the beneficiary not upon the date of the insured's death, at a time when the policy was not in force by premium payments, but as of a date not later than the last day the insurance was in force by premium payments.

Mr. Edward H. S. Martin for respondent.

Six year limitation as to claim of beneficiary runs only from death of insured, not from happening of total permanent disability.

A separate six year limitation as to each installment of total permanent disability benefits runs only from the due date of such installment.

As all installments maturing on or after October 3, 1926, were recoverable free from the limitation bar, the reversal of the District Court judgment was proper.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case turns upon the proper construction of the limitation provision of § 19 of the World War Veterans Act of 1924, as amended.[1]

The respondent brought an action in the District Court for Northern Illinois in his own right and as administrator of Robert C. Towery, deceased, upon claims on two war risk insurance term policies issued to the decedent while in the military service of the United States. The claim of respondent as administrator was for total permanent disability benefits alleged to have accrued to the insured in his lifetime, and the claim as beneficiary designated in the policies was based upon the death of the insured. The complaint alleged that the premiums were deducted from the insured's pay during his military service, from which he was discharged June 18, 1919; that he became totally and permanently disabled, while the policies were in force, on June 18, 1919; that he died April 22, 1927; that, on May 2, 1927, respondent was appointed administrator; that, on February 11, 1932, respondent made claim for disability and death benefits

[1] Act of June 7, 1924, c. 320, § 19, 43 Stat. 612, as amended by Act of July 3, 1930, c. 849, 46 Stat. 992; U. S. C. Tit. 38, § 445.

under the policies; that the claim was denied by the Veterans Administration August 8, 1935. Suit was instituted June 29, 1936. The Government moved to dismiss on the ground that the action was barred by limitation. The District Court granted the motion and gave judgment for the Government. On appeal the Circuit Court of Appeals reversed.[2] We granted certiorari because of alleged conflict of decision.[3]

Section 19 provides that, in the event of a disagreement between the veteran and the Bureau as to a claim under a policy, the claimant may bring an action in the District Court to obtain a decision of the controversy. The statute then proceeds:

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, . . . *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. . . ."

The Circuit Court of Appeals held that the "contingency," on the happening of which "the right accrued for which the claim is made," is not defined by the statute and must be ascertained from the policy provisions. In the light of these provisions the court held that, in the case of a claim for benefits payable to the insured, the contingency is the accrual of an installment and, in the case of a claim by a beneficiary, the contingency is the death of the insured.

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[2] 97 F. 2d 906.

[3] See *United States* v. *Tarrer,* 77 F. 2d 423.

The policy, while for a stated amount, calls for payment in monthly installments, two hundred and forty of which (interest being calculated at three and one-half per cent.) would equal the principal sum. Contrary to the view of the court below, disability benefits to the insured do not cease at the expiration of two hundred and forty months but are continued for life if the disability so long lasts.[4] Should the insured die, however, prior to the payment of two hundred and forty installments, further installments up to the limit of two hundred and forty are payable to his beneficiary. Should the beneficiary die before the receipt of all the remaining installments up to two hundred and forty, the commuted value of the unpaid installments is payable to the estate of the insured in one sum.[5] The court below reached its conclusion as to the meaning of the Act, first, by examination of the phrase "within six years after the right accrued for which the claim is made." In the view that, in case of the death of the insured, the beneficiary has a "right" for which a claim may be made and that, prior to the death of the insured, the latter also has a "right," namely, to receive each monthly benefit installment, the court concluded that there were two rights. If this be the correct view there is still a third "right,"—that of the administrator of the insured to claim a lump sum commuted value for installments unpaid to the beneficiary at the date of the latter's death. The court then addressed itself to the meaning of the word "contingency" in the first proviso of the section: "it shall be deemed that the right accrued on the happening of the

[4] Act of Oct. 6, 1917, c. 105, § 402, 40 Stat. 398, 409. Bulletin No. 3 Treasury Department, October 16, 1917. Regulations and Procedure U. S. Veterans Bureau 1930, Part II, pp. 1241, 1258, 1259.

[5] World War Veterans Act, 1924, as amended, U. S. C. Tit. 38, § 514; *McCullough* v. *Smith*, 293 U. S. 228.

contingency on which the claim is founded." The court held that, in the case of a disabled veteran, at least two contingencies must occur before the right to any monthly benefit accrued,—namely, the occurrence of permanent disability while the policy was in force and the existence of the disability at the date for which a particular monthly payment is claimed. In the case of a beneficiary, the court was of opinion that another contingency must be added, namely, the death of the insured. It made the choice from these possible alternatives by holding that the right accrued in the case of a living insured on the date when each monthly benefit payment became due and, in the case of a benficiary, when the insured died. This construction is said to comport with the liberal policy of Congress towards veterans and to be supported by the fact that an alternative period of one year from the date of the passage of the statute was accorded by Congress. The court viewed the six year period as a liberalizing alternative to the one year period, and, therefore, held the claim of the respondent, as beneficiary, was timely because suit had been instituted within the six year period as enlarged by the duration of the Veterans Administration's consideration. The claim, as administrator, for installments accruing in the life of the insured, was held maintainable for such installments as accrued due within six years (plus the additional time allowed for administrative consideration) prior to the institution of suit. We are unable to adopt this construction of the statute.

Section 19 plainly intends to put a time limitation upon the institution of suit, whereas, the decision of the court below would provide no such limitation upon suits by veterans for total permanent disability benefits, but simply a limitation on the number of installments recoverable; and, in application to disability cases, would

preclude only a recovery of certain installments whereas new suits might be brought thereafter by veterans, if living, in cases in which prior suits had been held barred.

We think the legislation and the policy do not confer two rights. The beneficiary's interest in the policy is derivative from that of the veteran. It may be taken away by legislation, even after the death of the insured.[6] There are different events upon the happening of which the payment of benefits to the veteran or to his beneficiaries or to his estate depend. We think it highly unlikely that Congress intended to accord each of the claimants of possible benefits under the policy six years from the time any installment or lump sum payment fell due within which to bring suit.

Millions of veterans allowed their yearly convertible term insurance to lapse when they left the Service.[7] Congress provided that if, at the time of the lapse, the veteran was totally and permanently disabled he might recover notwithstanding he had not made immediate and timely claim. Section 19 of the Act of 1930 was an amendment of an earlier act. The statute was undoubtedly intended as one of repose. The purpose of its adoption, as shown by the Committee Reports,[8] was to substitute a uniform rule of limitation for suits on contracts of insurance in lieu of the state statutes, which, pursuant to the Conformity Act, had theretofore been applied. These varied as respects the period prescribed from three to twenty years. As the reports show, the additional year from the date of the passage of the Act was granted to prevent the hardship of cutting off claims which would have been barred by the six year limitation

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[6] *White* v. *United States*, 270 U. S. 175.

[7] *Lynch* v. *United States*, 292 U. S. 571, 576.

[8] House Committee Report No. 1274, 70th Congress, First Session, p. 1. Senate Committee Report No. 1297, 70th Congress, First Session, p. 1.

at the date of the Act. A reading of the section as a whole is persuasive that what Congress intended by "the contingency upon which the claim is founded" was the contingency on which liability under the policy was bottomed, namely,—permanent disability or death while the policy remained in force.

The construction adopted by the court below would permit the bringing of suits even twenty years after the disability occurred. It is obvious that each year ascertainment of the essential facts which conditioned liability would become more difficult. We think then that, reasonably construed, the section provides that there shall be but one right,—that is, the right to benefit payments, and but one critical contingency which conditions that right, namely, the occurrence of permanent total disability or death while the policy remains in force.

All the other contingencies referred to by the court below, which condition actual payment of the benefits to one person or another, are of minor importance. They are not matters with respect to which disagreement with the Veterans Administration is likely.

Two objections are raised by the respondent to this construction of the section. First, it is said that if suit is brought on a policy and judgment recovered that judgment is only for the installments which have theretofore fallen due and that if the Government should fail to pay subsequently accruing installments these might, under our ruling, be barred by the six year limitation. We have said: [9] "Undoubtedly, when one's right to recover is established by judgment, the Veterans' Bureau will pay him installments maturing in his favor after the commencement of the action." This has been the consistent administrative practice. Indeed the Bureau has treated a judgment for installments due the veteran as requiring,

[9] *United States* v. *Worley*, 281 U. S. 339, 341.

without further claim, the payment of remaining installments due the beneficiary after his death.[10] The other objection is that, as benefit payments cease on the cessation of the disability, the Veterans Administration may refuse further payments on that ground and, if the insured disagrees with the Bureau's ruling, a suit to test its validity may be barred. The answer is that, under the policy's terms and the administrative rulings, the policy is automatically reinstated for a reduced sum after taking account of the prior payment of benefits and may be continued in force by the insured by the payment of future premiums.[11] If he contends that when the policy is thus reinstated he is still permanently and totally disabled, he has the full six years granted by the statute in which to litigate the claim since, if he can establish his contention, he would have been totally and permanently disabled at a time when the policy was in force.

The judgment is

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* SANDS MANUFACTURING CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 274. Argued January 12, 1939.—Decided February 27, 1939.

1. Findings of the National Labor Relations Board that respondent, in violation of § 8 (5) of the Labor Relations Act, had refused to bargain collectively with the representatives of its employees; had discriminated in regard to hire and tenure of employment and discouraged membership in a labor organization, in violation of § 8 (3); and, in violation of § 8 (1), had interfered with, restrained, and coerced its employees in the exercise of the right of self-

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[10] Letter of Solicitor of Veterans Administration, February 8, 1938.
[11] Veterans' Administration Regulations R. 3141-3143.

organization, affiliation with labor organizations and collective bargaining as guaranteed by § 7—*held* unsupported by the evidence. P. 339.

2. Also unsupported by the evidence was the Board's ultimate conclusion that respondent's conduct permitted no reasonable inference other than that its employees were locked out, discharged, and refused employment because they were members of a particular labor organization and had engaged in concerted activities for the purpose of collective bargaining. P. 339.
3. Respondent had a contract with a labor organization of its employees which gave it the right to operate its plant on the basis of "departmental seniority." In violation of the agreement, the labor organization subsequently demanded that respondent abandon "departmental seniority" or shut down its plant. Respondent chose the latter course. At the time of the closing of the plant, no further negotiations between the parties were pending, each had rejected the other's proposals, and there were no arrangements for any further meeting.

   Held that, in these circumstances, respondent was free to treat the employees as having severed their relationship, and to consummate the separation by hiring others to take their places. The Act does not forbid the discharge of an employee for repudiation of his agreement. P. 344.
4. Respondent's offer to reëmploy four men as foremen on terms which might have formed a basis of compromise had similar offers been made to all of the men, did not support the Board's finding of a refusal to bargain collectively with the union. P. 344.
5. Having the right to employ others to take the places of the discharged employees, respondent had the right also to contract with another union for the services of the new men. P. 345.
6. Nor was respondent precluded from making individual contracts for the reëmployment of some of its discharged employees. P. 345.
7. The contention that respondent's offer of reëmployment to two of its old men on condition that they join the other union was a violation of § 8 (3) of the Act, *held* irrelevant to any issue in this case. P. 346.

96 F. 2d 721, affirmed.

CERTIORARI, 305 U. S. 586, to review a judgment denying a petition of the Labor Board for enforcement of an order and setting the order aside.

Mr. Charles A. Horsky, with whom *Solicitor General Jackson,* and *Messrs. Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* were on the brief, for petitioner.

Mr. Harry E. Smoyer, with whom *Mr. Welles K. Stanley* was on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals denied the petition of the National Labor Relations Board for enforcement of an order against the respondent and granted the respondent's petition to set aside the order.[1] We issued the writ of certiorari because of alleged conflict.[2]

After complaint, answer, and hearing, the Board found that the respondent, an Ohio corporation which manufactures water heaters in Cleveland, had engaged, and continued to engage, in unfair labor practices as defined by § 8, subsections (1), (3), and (5) of the National Labor Relations Act,[3] and ordered the company to cease and desist from violating those provisions and to offer reinstatement to former employes with compensation for loss of wages from September 3, 1935.[4]

The respondent contends and the court below held that upon the findings of fact, and the uncontradicted evidence, the Board's conclusions are without support in the record. The petitioner insists that there is evidence to support them. From the findings, and the uncontradicted evidence, these facts appear: In the spring of 1934

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[1] 96 F. 2d 721.

[2] See *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. 2d 134.

[3] Act of July 5, 1935, c. 372, 49 Stat. 449, 452; U. S. C. Supp. III, Tit. 29, § 158.

[4] 1 N. L. R. B. 546.

most of respondent's employes joined the Mechanics Educational Society of America (hereinafter called "Mesa"), an independent labor organization. The respondent manifested no opposition to their so doing, expressed its willingness that its men join any organization they chose, and readily met with a shop committee of the union to discuss grievances and working conditions. An agreement effecting an increase of wages, and affecting working conditions, was entered into between the respondent and the union. Although limited in term to sixty days it was continued, by mutual agreement, and under it all matters of controversy between employer and employes were settled by conference between the shop committee of the union and officials of the company.

In May 1935 the committee demanded, and the company refused, an increase of wages. A strike was called, but negotiations went on between the company and the union. All differences were adjusted save that the company was unwilling to reinstate certain men alleged to be incompetent. The union insisted that these men be taken back and thereafter be afforded a hearing by the management and the shop committee. When work was resumed the company did not permit the men in question to return. Thereupon a second strike was called. Negotiations again ensued as a result of which the shop committee agreed to draft and submit a contract to the respondent. This was done. The management demanded certain changes in the draft, to which the committee agreed; a contract extending to March 1, 1936, was executed on June 15, 1935, and the men returned to work. The agreement provided that the company would recognize the shop committee as representing the employes for collective bargaining; that no employe should be discharged without a hearing before the shop committee and the management; that certain employes should be discharged and not rehired; that stipulated

notice should be given of layoffs due to shortage of work; that new employes might join any labor organization they chose. It also covered wages and hours of work. It further provided: "In case of a misunderstanding between the management and the employes, the committee shall allow the management forty-eight hours to settle the dispute and, if then unsuccessful, the committee shall act as they see fit." Provisions as to seniority will be presently stated.

In 1934 the company had an opportunity to procure a government order. Its officers conferred with the men and stated that they would take the government order if assured that no labor trouble would interfere with its execution. On receiving this assurance the order was taken and the working force more than doubled by the employment of new men. It was agreed with the union that these men might joint the "Mesa" and in fact many of them did so. It was also agreed that when the government order was finished these new men should be discharged so that the old men could remain at work.

The company's plant was divided into a number of departments, one of which was the machine shop. The wage scales differed in different departments and the foremen and old men whom the company employed in each department received higher wages than new men in the same department. The company had had a practice of keeping the old men at work, in case business was slack, by transferring them from their own departments to others at their regular pay. When negotiations were under way for the agreement of June 15, 1935, the company insisted on discontinuing this practice of transferring old men from one department to another, stating that it would recognize, as theretofore, the seniority rights of old men but only in the departments in which particular men belonged. The management insisted that the practice of transferring men from one department to an-

other resulted in inefficiency. The Board has found that the company in fact disapproved of the practice because it resulted in paying higher wages than would have been the case had the new men been retained or recalled to the busy department instead of transferring old men from other departments thereto. As a result of the insistence of the respondent, certain paragraphs of the proposed draft submitted by the employes were altered. These paragraphs follow, with the alterations demanded by the management in italics:

"(5) That when employees are laid off, seniority rights shall rule, *and by departments*.

"(6) That when one department is shut down, men from this department will not be transferred or work in other departments until all old men *only* within that department, who were laid off, have been called back.

"(7) That all new employees be laid off before any old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days."

On June 17, 1935, the company hired approximately 30 additional men, some of whom had worked for the respondent while the government order was being filled. By the middle of July work was becoming slack and respondent proceeded to reduce its working force. About July 15, 1935, after conferences between the management and the employees, all the men in the tank heater department except the foreman were laid off.

In the agreement of June 15, 1935, the 31 men who were employes of the respondent prior to the government order of 1934 were designated as "old men" and those employed while the government order was being filled were "new men." About July 30, 1935, a notice was posted on the time clock in the plant that the new men would be laid off on July 30 and the old men would be laid off on August 2, 1935. After the layoff of the new

men another notice was posted to the effect that the plant would be operated with the old men on a schedule of three days a week.

Thus, by the end of July or the beginning of August, some departments were being operated on a part time basis and others had been practically shut down. At or about this time, the respondent wished to increase the working force in the machine shop, the key department, while at the same time shutting down the other departments. Repeated conferences were held between the management and the shop committee in reference to this matter. The positions of the respondent and the employes were diametrically opposed. The management contended that new men, experienced in machine shop work, be employed in preference to the old men. The shop committee contended that, under the agreement of June 15, 1935, the respondent could not hire any new men for the machine shop as long as old men were still laid off. The management claimed that the shop committee was insisting upon a violation of Article 5 of the agreement. On August 19th an officer conferred with the shop committee and announced that the company would either keep the machine shop running according to the company's plan or temporarily close the plant. The committee was requested to confer with the employes and communicate their decision. After conference with the employes the committee stated that the company would not be allowed to run the machine shop unless it transferred old men in lieu of new men to that shop, and that if it did not comply with this condition it could close the plant. Accordingly, on August 21st, notice was posted that the plant would be closed until further notice.

August 26th and 27th officers of respondent negotiated with the International Association of Machinists, an affiliate of the American Federation of Labor, and, on August 31st, made a contract with that union effective

September 3rd. It also recruited labor from the county relief organization. Practically all of the employes so obtained were members of the International. It offered reemployment to several of the old "Mesa" members, as foremen, on the basis of annual employment at a lower hourly wage instead of the higher hourly wage theretofore paid them, subject to layoffs. The offer was refused. September 3rd the plant reopened. On September 4th, a representative of "Mesa" called an officer of respondent and demanded a conference. The demand was refused on the ground that the men had been discharged. The "Mesa" picketed the plant for about a month thereafter.

The Board held that the company had refused to bargain collectively with the representatives of its employes as required by § 8 (5) of the Act; had discriminated in regard to hire or tenure of employment and discouraged membership in a labor organization contrary to the provisions of § 8 (3); and, in violation of § 8 (1), had interfered with, restrained, and coerced its employes in the exercise of the right of self-organization, affiliation with labor organizations and collective bargaining as guaranteed by § 7. The Circuit Court of Appeals disagreed with these conclusions. We hold that its decision was right.

First. The petitioner urges the correctness of the ultimate conclusion that the respondent's conduct permits no reasonable inference save that the employes were locked out, discharged, and refused employment because they were members of the "Mesa" and had engaged in concerted activities for the purpose of collective bargaining. We think the conclusion has no support in the evidence and is contrary to the entire and uncontradicted evidence of record.

The respondent did not attempt to prevent organization of its employes or discourage their affiliation with "Mesa" or interfere with their relations with that body. There is no evidence of espionage or coercion by the com-

pany. Immediately upon the unionization of the men in the spring of 1934, the respondent recognized and conferred with the shop committee whenever requested so to do. May 2, 1934, it entered into an agreement with the union. It consulted the union respecting hiring of additional employes for the filling of the government order in the autumn of 1934 and complied with its promise to discharge additional men hired for this purpose when the order had been completed. All but three of the men hired became members of "Mesa" without objection on the part of the company. From May 1934 to May 1935 the company negotiated with the union and the latter never had any trouble in getting meetings with the management. When, in 1935, a strike was called as a result of the refusal of the shop committee's demand for a wage increase, the company continued negotiations during the strike and made an oral agreement under which the strikers returned to work. When three days later they struck again because of a refusal to reinstate some of their number, although a representative of "Mesa" said several of these men might be incompetent, the company took the men back and continued to negotiate with the union with the result that a draft of a contract was submitted by the shop committee. After the company had insisted on certain changes with respect to departmental seniority, the draft ripened into a contract June 15, 1935.

. Thereafter the respondent had hearings with the shop committee as to the discharge of an employe for incompetence and there is no suggestion that, between June 15th and August 21st, it failed to live up to its contract in any respect. Repeated meetings were held with the shop committee to discuss the terms of the contract respecting departmental seniority. The evidence of the members of the shop committee demonstrates that this matter was fully discussed before the contract was executed and that the members of the committee under-

stood the company's position and the reason for the alterations in the committee's draft. Throughout the summer of 1935 the company, while adhering to its position, attempted to accommodate its practices to the demands of the shop committee, evidently in order to avoid a strike. When the final conference of August 19th took place the company's manager made it clear to the committee that he desired to operate the machine shop with the new men belonging in that department and when the committee advised him this would not be permitted he asked them to go to the men and find out whether the proposed operation would be permitted or whether the plant would have to be shut down. On August 21st the committee brought back a reply to the effect that the company could shut down the plant but could not operate the machine shop on the principle of departmental seniority. The company then closed the plant and did not open it until it had employed new men under a contract with another union which gave it the option to enforce departmental seniority. Save for one item of evidence, this is all the record discloses to indicate that the discharge and replacement of the men arose from a discrimination against them for union activities and the exercise of the right of collective bargaining. Manifestly it is not only insufficient to sustain any such conclusion but definitely refutes it. The Board supports the conclusion by reference to the testimony of two men. One, Norman, who was, with the union's consent, discharged after the agreement of June 15, 1935, for incompetency, testified he thought he was discharged as a result of a grudge. He said that in June, one McKiernan, a shipping clerk who was his superior, told him when he complained about his discharge: "I will tell you; there is a lot more of this than you and I know of . . ." "I will get you back when we break this union up . . ." There is the further testimony of

a witness Rudd who says that the superintendent said to him in June, in effect, that it would be better to have the A. F. of L. union as they were more conservative and not so likely to strike. This was just after "Mesa" had called two strikes in the plant. Neither of the men who are quoted held such a position that his statements are evidence of the company's policy even in June, two months before the discharge, and the inference of hostility to "Mesa" drawn from their testimony does not, in any event, amount to a scintilla when considered in the light of respondent's long course of conduct in respect of union activities and in dealing freely and candidly with "Mesa."

Second. The Board held that respondent violated the obligation imposed upon it by the statute to bargain collectively with representatives of its employes. The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employes to the end that employment contracts binding on both parties should be made.[5] But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employes' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning. Upon this basis the respondent was not deficient in the performance of its duty.

The contract provided for departmental seniority, in §§ 5 and 6, and § 7 did not create any ambiguity on the subject. Moreover, the record makes it clear that the committee which negotiated the contract on behalf of the union fully understood its terms in the same sense as did the respondent. In this situation how often and

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[5] Report No. 573 of Senate Committee on Education and Labor, 74th Cong., 1st Sess., p. 12.

how long was the company bound to continue discussion of the committee's demand that the provisions of the contract should be ignored? It is to be borne in mind that § 20 of the contract provided that if the company did not meet the committee's views within forty-eight hours the employes reserved full liberty of action and this meant that if the company did not accede to demands a strike might follow.

We come then to consider the situation of the respondent in August 1935. The Board has found that it desired to operate its machine shop in accordance with its honest understanding of the contract. Its motive, whether efficiency or economy, was proper. It had stated its views to the committee. The committee was adamant; its stand was that the company could close its entire plant if it chose, but it could not operate the machine shop in accordance with the provisions of the contract. If it attempted the latter alternative a strike was inevitable. The Board found that it was inconceivable that the employes would have accepted the company's construction of the contract even if they had been threatened with discharge at the time. It is evident that the respondent realized that it had no alternative but to operate the plant in the way the men dictated, in the teeth of the agreement, or keep it closed entirely, or have a strike. When the representatives of the two parties separated on August 21, no further negotiations were pending, each had rejected the other's proposals, and there were no arrangements for a further meeting. On the following days the factory was closed.

The Board finds that, in this situation, the respondent was under an obligation to send for the shop committee and again to reason with its members or to wait until the situation became such that it could operate its whole plant without antagonizing the employes' views with respect to departmental seniority. We think it was under

no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employes.[6] No such request was made prior to September 4th. Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employe of his agreement, any more than it prohibits such discharge for a tort committed against the employer.[7] As the respondent had lawfully secured others to fill the places of the former employes and recognized a new union, which, so far as appears, represented a majority of its employes, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employes.

It is urged that the company's offer to re-employ four men as foremen on the basis of guaranteed annual compensation, at a lower hourly rate than had theretofore been paid them, is evidence to support the Board's finding of a refusal to bargain collectively with the union. The argument is that if the company had made a similar offer to all of the men this might have formed a basis of compromise, since one of the employes to whom an officer talked indicated that the men might be willing to take a cut in wages; but there is no evidence that the

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[6] Compare *National Labor Relations Board* v. *Columbian Enameling & Stamping Co., ante,* p. 292, 298–299.

[7] Compare *National Labor Relations Board* v. *Fansteel Metallurgical Corp., ante,* p. 240, 254ff.

company had any thought of offering a similar contract to others than the foremen of departments, and the breach of contract of which the men were guilty left the company under no obligation to initiate negotiations for a new and different contract of employment with them.

Third. Certain occurrences subsequent to August 21, 1935, are urged by the Board in support of its finding that respondent's discharge of its forty-eight employes constituted discrimination against the union and failure to bargain collectively. The first of these is its application to the International Association for men and its making an agreement with that union on August 26th and 27th. If, as we have held, the respondent was confronted with a concerted refusal on the part of "Mesa" to permit its members to perform their contract there was nothing unlawful in the company's attempting to procure others to fill their places.[8] If the respondent was at liberty to hire new employes it was equally at liberty to make a contract with a union for their services.[9]

The offering of re-employment to four of the old employes, upon a new and different basis, is said to constitute discrimination against "Mesa," but the answer is that if the whole body of employes had been lawfully discharged the law does not prohibit the making of individual contracts with men whose prior relations had thereby been severed.[10]

Fourth. The Board found as a fact that in offering re-employment to two of its old men the respondent stipulated as a condition that they join the International

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[8] Compare *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345.

[9] Compare *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236–237.

[10] Compare *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44, 45; *National Labor Relations Board* v. *Fansteel Corp.*, *ante*, p. 240, 259.

union. The finding is sharply challenged but, as there is evidence in support of it, we accept it. Based upon this finding the Board contends this stipulation in connection with the offer to hire the men was a violation of § 8 (3) of the Act independent of any of the violations flowing out of the discharge and refusal to re-employ the men as a body. The contention is irrelevant to any issue in the cause. The complaint alleges that the discharge of the men constituted an unfair labor practice in violation of § 8 (1) and (3) and that the execution of the agreement with the international association constituted an unfair labor practice under § 8 (5). It nowhere refers to any discrimination in hiring any man or men or charges any violation in connection therewith.

The decree is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE REED dissent.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 426. Argued February 8, 1939.—Decided February 27, 1939.

A state statute regulating the milk industry, which requires dealers to obtain licenses; to file bonds conditioned on payment of purchases from producers; and to pay producers at least the minimum prices prescribed by an administrative agency,—*held* not violative of the commerce clause of the Federal Constitution, as applied to a dealer who, at a receiving station maintained by him within the State, purchases milk from neighboring farms, all of which he ships to another State for sale. P. 352.

The obvious purpose of the Act was to control a domestic situation in the interest of the producers and consumers within the

State. Because of the comparatively small amount of the State's total milk production which was exported, the effect of the Act on interstate commerce was incidental. In the absence of regulation by Congress, the Act did not constitute a prohibited burden on interstate commerce.

332 Pa. 34; 200 A. 854, reversed.

CERTIORARI, 305 U. S. 589, to review the affirmance of a decree dismissing a bill to enforce compliance with a state milk control law.

Mr. Harry Polikoff, Deputy Attorney General of Pennsylvania, with whom *Mr. Guy K. Bard,* Attorney General, was on the brief, for petitioner.

If the decision of the court below is the law of the land, the stabilization of the milk industry of the United States by means of milk control legislation, and all commerce in milk, will be greatly hindered. At least twenty States (practically all the dairy states) today have upon their statute books legislation of the kind that is involved in this case. Milk dealers in any State may evade all regulation by simply purchasing their milk at plants which they erect in other States, thus creating an area without law, to the detriment of dairy farmers, other dealers and the consuming public.

It is a matter of common knowledge that milk dealers with no assets in the State, buy their milk on credit; if required to post neither license nor bond they would indeed have the farmers "at their mercy." *Rohrer* v. *Milk Control Board,* 322 Pa. 257, 265.

Only a small amount of the milk produced in Pennsylvania is shipped to other States; yet it is common knowledge that the malpractices of a minority can disrupt an entire industry. It is impossible to maintain fair dealings in an industry within a State for the benefit of the inhabitants of the State, if here and there a milk dealer can create an area without law merely because he ulti-

mately resells the milk in some other State. (No attempt has been made to apply the present statute to any resales by the defendant.)

Mr. Thomas D. Caldwell for respondent.

A State can not, under the guise of stabilizing the milk industry, directly burden or regulate milk shipped in interstate commerce. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50.

The cost of the milk to respondent will be increased by the premium on the bond, by the license fee, and by the increase in price ordered by the Commission. The effect of such regulation and such price fixing would be exactly equivalent to the imposition of a tax on the export of milk.

The statute may not be interpreted as an inspection law, in view of the separate and distinct inspection laws passed by the Commonwealth.

The license and bond requirements would, in the language of *Baldwin* v. *Seelig*, 294 U. S. 511, indirectly regulate the prices to be paid to producers of commodities in interstate commerce. Since the buying as well as the shipping of milk from Pennsylvania to New York constitutes interstate commerce, the Commonwealth can not regulate incidents pertaining to the buying of milk in Pennsylvania, as it, by indirection, would affect the entire transaction. See *Pennsylvania Railroad Co.* v. *Clark Coal Co.*, 238 U. S. 456; *Talbot* v. *Smith*, 277 S. W. 257; *Community Natural Gas Co.* v. *Royse City*, 7 F. Supp. 481.

By leave of Court, *Messrs. John J. Bennett, Jr.*, Attorney General of New York, *Henry Epstein*, Solicitor General, *Milo R. Kniffen*, and *Robert G. Blabey* filed a brief on behalf of the Commissioner of Agriculture and Markets of the State of New York, as *amicus curiae*, in support of petitioner.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We are called upon to determine whether a local police regulation unconstitutionally regulates or burdens interstate commerce.

Pennsylvania, by an Act of April 30, 1935 [1] has declared the milk industry in that Commonwealth to be a business affected with a public interest. The statute defines a milk dealer as any person "who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth." It creates a Milk Control Board with authority to investigate, supervise, and regulate the industry and imposes penalties for violations of the law or of the Board's orders issued pursuant to the law, and requires a dealer to obtain a license by application to the Board. Licenses may be refused, suspended, or revoked for specified causes. A requisite of obtaining a license is that the dealer shall file with the Board a bond conditioned for the prompt payment of all amounts due to producers for milk purchased by the licensee. The act empowers the Board to require the dealer to keep certain records and directs the Board, with the approval of the Governor, to "fix, by official order, the minimum prices to be paid by milk dealers to producers and others for milk." The Board may vary the price according to the production, use, form, grade or class of milk.[2]

The petitioner, the Milk Control Board, filed its bill in a Common Pleas Court to restrain the appellee from continuing to do business without complying with the statute. The respondent by its answer sought to justify

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[1] P. L. 96; 31 P. S. § 684.

[2] The act was repealed by an Act of April 28, 1937, P. L. 417, but all proceedings under it were saved by § 1203 of the later act. See *Commonwealth* v. *Ortwein*, 132 Pa. Superior Ct. 166; 200 Atl. 859.

failure to comply on the ground that it was engaged in interstate commerce. After trial the court dismissed the bill. The Supreme Court of Pennsylvania affirmed the decree.[3]

The respondent, a Pennsylvania corporation, leases and operates a milk receiving plant in Elizabethville, Pennsylvania, at which it buys milk from approximately one hundred and seventy-five farmers in the neighborhood, who bring their milk to the plant in their own cans. There the milk is weighed and tested by the respondent and emptied into large receiving tanks in which it is cooled preparatory to shipment. This requires retention of the milk for less than twenty-four hours; it is not processed, and no change occurs in its constituent elements. The milk is then drawn from the cooling tanks into tank trucks operated by a contract carrier and transported into New York City for sale there by the respondent. The journey is continuous from Elizabethville to New York City. All milk purchased by the respondent at Elizabethville is shipped to and sold in New York. During the year 1934 approximately 4,500,000,000 pounds of milk were produced in Pennsylvania of which approximately 470,000,000 pounds were shipped out of the state.

The respondent contends that the act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the prices prescribed by the Board, unconstitutionally regulates and burdens interstate commerce. The State Supreme Court has held that the statute is a valid police regulation.[4] The petitioner concedes that the purchase, shipment into

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[3] 332 Pa. 34; 200 Atl. 854.

[4] See the opinion below, and *Colteryahn Sanitary Dairy* v. *Milk Control Comm'n*, 332 Pa. 15; 1 Atl. 2d, 775; *Keystone Dairy Co.* v. *Milk Control Comm'n*, 332 Pa. 15; 1 Atl. 2d 775; *Rohrer* v. *Milk Control Board*, 322 Pa. 257; 186 Atl. 336.

another state, and sale there of the milk in which the respondent deals is interstate commerce. The question for decision is whether, in the absence of federal regulation, the enforcement of the statute is prohibited by Article I, § 8 of the Constitution. We hold that it is not.

When the people declared "The Congress shall have Power . . . To regulate Commerce . . . among the several States, . . ." their purpose was clear. The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein. The grant of the power of regulation to the Congress necessarily implies the subordination of the states to that power. This court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority.[5] But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority.[6] One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though,

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[5] *Minnesota Rate Cases,* 230 U. S. 352, 399, and cases cited.

[6] *Ibid.*

should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable.[7] These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse.

The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.

The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York.

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[7] *Ibid.*, pp. 402–403.

If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress.

None of the decisions on which the court below and the respondent rely rules the instant case. *DiSanto* v. *Pennsylvania,* 273 U. S. 34, involved a state law directed solely at foreign commerce; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, condemned a state statute affecting commerce, over ninety per cent. of which was interstate and essaying to regulate the price of commodities sold within the state payable and receivable in the state of destination; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, also dealt with a state law intended to regulate commerce almost wholly interstate in character. In *Baldwin* v. *Seelig,* 294 U. S. 511, this court condemned an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, and we indicated that the attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state.

The decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

[Over.]

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the Supreme Court of Pennsylvania properly concluded that under former opinions of this Court the questioned regulations constituted a burden upon interstate commerce prohibited by the Federal Constitution.

PIERRE *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 142. Argued February 3, 6, 1939.—Decided February 27, 1939.

1. When the jury commissioners of a state court intentionally and systematically exclude negroes from among the persons summoned and listed for jury service, an indictment for murder, returned against a negro by a grand jury drawn or selected from such lists, is void under the equal protection clause of the Fourteenth Amendment. P. 357.
2. In determining whether, as matter of fact, such discrimination existed in this case, the findings and conclusions of the State Supreme Court, though entitled to great respect, are not binding on this Court. P. 358.

189 La. 764; 180 So. 630, reversed.

CERTIORARI, 305 U. S. 586, to review a judgment affirming a sentence of death.

Mr. Maurice R. Woulfe for petitioner.

Mr. John E. Fleury, with whom *Messrs. Gaston L. Porterie,* Attorney General of Louisiana, *James O'Connor,* Assistant Attorney General, and *Ernest M. Conzelmann* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Indicted for murder, petitioner, a member of the negro race, was convicted and sentenced to death in a state court of the Parish of St. John the Baptist, Louisiana.

The Louisiana Supreme Court affirmed.[1] His petition for certiorari to review the Louisiana Supreme Court's judgment rested upon the grave claim—earnestly, but unsuccessfully urged in both state courts—that because of his race he had not been accorded the equal protection of the laws guaranteed to all races in all the States by the Fourteenth Amendment to the Federal Constitution. For this reason, we granted certiorari.[2]

The indictment against petitioner was returned January 18, 1937. He made timely motion to quash the indictment and the general venire from which had been drawn both the Grand Jury that returned the indictment and the Petit Jury for the week of his trial. His motion also prayed that the Grand Jury Panel and the Petit Jury Panel be quashed. This sworn motion alleged that petitioner was a negro and had been indicted for murder of a white man; that at least one-third of the population of the Parish from which the Grand and Petit Juries were drawn were members of the negro race, but the general venire had contained no names of negroes when the Grand Jury that indicted petitioner was drawn; that the state officers charged by law with the duty of providing names for the general venire had "deliberately excluded therefrom the names of any negroes qualified to serve as Grand or Petit Jurors, . . ." and had "systematically, unlawfully and unconstitutionally excluded negroes from the Grand or Petit Jury in said Parish" for at least twenty years "solely and only because of their race and color"; and that petitioner had thus been denied the equal protection of the laws guaranteed him by the Constitution of Louisiana and the Fourteenth Amendment to the Constitution of the United States.

No pleadings denying these allegations appear in the record, and the State offered no witnesses on the mo-

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[1] 189 La. 764; 180 So. 630.

[2] 305 U. S. 586.

tion. Petitioner offered twelve witnesses who were questioned by his counsel, the State's Assistant District Attorney, and the court. On the basis of this evidence, the trial judge sustained the motion to quash the Petit Jury Panel and venire and subsequently ordered the box containing the general venire (from which both Grand and Petit Juries had been drawn) emptied, purged and refilled. This was done; a new Petit Jury Panel composed of both whites and negroes was subsequently drawn from the refilled Jury box and from this Panel a Petit Jury was selected which tried and convicted petitioner. Although the Grand Jury that indicted petitioner and the quashed Petit Jury Panel had been selected from the same original general venire [3] the trial judge overruled that part of petitioner's motion seeking to quash the Grand Jury Panel and the indictment.

First. The reason assigned by the trial judge for refusing to quash the Grand Jury Panel and indictment was that "the Constitutional rights of the defendant [are] . . . not affected by reason of the fact that persons of the Colored or African race are not placed on the Grand Jury, because . . . the mere presentment of an indictment is not evidence of guilt . . . it simply informs the Court

[3] Under Louisiana practice the District Judge orders the Jury Commission to select three hundred qualified jurors in a given Parish, who compose the general venire list, to be kept complete and supplemented from time to time. These names are placed in the "General Venire Box." From the general venire list, the Commission selects twenty persons qualified as grand jurors, to serve six months, who compose the "List of Grand Jurors." The Judge selects a foreman from the "List of Grand Jurors" and the sheriff draws eleven more who, with the foreman, constitute the Grand Jury Panel. After selection of the "List of Grand Jurors" the Commission draws thirty names from the "General Venire Box" to serve as Petit Jurors, who are designated a "List of Jurors" and this "List of Jurors" is kept in the "Jury Box." Louisiana Code of Criminal Procedure (Dart, 1932) Title XVIII, c. 2.

of a commission of a crime and brings the accused before the court for prosecution." But the bill of rights of the Louisiana Constitution (Dart, 1932, Art. 1, § 9) provides that "no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, . . ." And the State concedes here, as the Supreme Court of Louisiana pointed out in its opinion in this case, that ". . . . it is specially provided in the [Louisiana] law prescribing the method of drawing grand and petit jurors to serve in both civil and criminal cases that 'there shall be no distinction made on account of race, color or previous condition,' " and "If . . . [qualified] members of the negro . . . race . . . have been systematically excluded from . . . service in the parish of St. John, . . . solely because of their race or color, the indictment should have been quashed . . ." Exclusion from Grand or Petit Jury service on account of race is forbidden by the Fourteenth Amendment.[4] In addition to the safeguards of the Fourteenth Amendment, Congress has provided that "No citizen possessing all other qualifications . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color or previous condition of servitude; . . ." [5] Petitioner does not here contend that Louisiana laws required an unconstitutional exclusion of negroes from the Grand Jury which indicted him. His evidence was offered to show that Louisiana—acting through its administrative officers—had deliberately and systematically excluded negroes from jury service because of race, in violation of the laws and Constitutions of Louisiana and the United States.[6]

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[4] *Strauder* v. *West Virginia,* 100 U. S. 303, 308, 309; *Carter* v. *Texas,* 177 U. S. 442, 447; *Martin* v. *Texas,* 200 U. S. 316, 319.

[5] U. S. C. Title 8, § 44.

[6] Cf., *Norris* v. *Alabama,* 294 U. S. 587, 589; *Neal* v. *Delaware,* 103 U. S. 370, 397; *Carter* v. *Texas, supra,* at 447; *Hale* v. *Kentucky,* 303 U. S. 613, 616.

If petitioner's evidence of such systematic exclusion of negroes from the general venire was sufficient to support the trial court's action in quashing the Petit Jury drawn from that general venire, it necessarily follows that the indictment returned by a Grand Jury, selected from the same general venire, should also have been quashed.

Second. But the State insists, and the Louisiana Supreme Court held (the Chief Justice dissenting), that this evidence failed to establish that members of the negro race were excluded from the Grand Jury venire on account of race, and that the trial court's finding of discrimination was erroneous. Our decision and judgment must therefore turn upon these disputed questions of fact. In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts [7]—for equal protection to all is the basic principle upon which justice under law rests. Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service.[8] The Fourteenth Amendment intrusts those who because of race are denied equal protection of the laws in a State first "to the revisory power of the higher courts of the State, and ultimately to the review of this court." [9]

Petitioner's witnesses on the motion were the Clerk of the court—ex-officio a member of the Jury Commission;

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[7] *Norris* v. *Alabama,* 294 U. S. 587, 590.

[8] Cf. *Strauder* v. *West Virginia, supra,* 308, 309.

[9] *Virginia* v. *Rives,* 100 U. S. 313, 319.

the Sheriff of the Parish; the Superintendent of Schools who had served the Parish for eleven years; and other residents of the Parish, both white and colored. The testimony of petitioner's witnesses (the State offered no witnesses) showed that from 1896 to 1936 no negro had served on the Grand or Petit Juries in the Parish; that a venire of three hundred in December, 1936, contained the names of three negroes, one of whom was then dead, one of whom (D. N. Dinbaut) was listed on the venire as F. N. Dinfant; the third—called for Petit Jury service in January, 1937—was the only negro who had ever been called for jury service within the memory of the Clerk of the court, the Sheriff, or any other witnesses who testified; and that there were many negro citizens of the Parish qualified under the laws of Louisiana to serve as Grand or Petit Jurors. According to the testimony, negroes constituted 25 to 50 per cent of a total Parish population of twelve to fifteen thousand. The report of the United States Department of Commerce, Bureau of the Census, for 1930, shows that the total Parish population was fourteen thousand and seventy-eight, 49.7 per cent native white, and 49.3 per cent negro. In a total negro population (ten years old and over) of five thousand two hundred and ninety, 29.9 per cent were classified by the census as illiterate.

The Louisiana Supreme Court found—contrary to the trial judge—that negroes had not been excluded from jury service on account of race, but that their exclusion was the result of a *bona fide* compliance by the Jury Commission with state laws prescribing jury qualifications. With this conclusion we cannot agree. Louisiana law requires the Commissioners to select names for the general venire from persons qualified to serve without distinction as to race or color. In order to be qualified a person must be:

(a) A citizen of the State, over twenty-one years of age with two years' residence in the Parish,
(b) Able to read and write the English language,
(c) Not charged with any offense or convicted of a felony,
(d) Of well known good character and standing in the community.[10]

The fact that approximately one-half of the Parish's population were negroes demonstrates that there could have been no lack of colored residents over twenty-one years of age.

It appears from the 1930 census that 70 per cent of the negro population of the Parish was literate, and the County Superintendent of Schools testified that fully two thousand five hundred (83 per cent), of the Parish's negro population estimated by him at only three thousand, were able to read and write. Petitioner's evidence established beyond question that the majority of the negro population could read and write, and, in this respect, were eligible under the statute for selection as jurymen.

There is no evidence on which even an inference can be based that any appreciable number of the otherwise qualified negroes in the Parish were disqualified for selection because of bad character or criminal records.

We conclude that the exclusion of negroes from jury service was not due to their failure to possess the statutory qualifications.

The general venire box for the Parish in which petitioner was tried was required[11]—under Louisiana law—to contain a list of three hundred names selected by Jury Commissioners appointed by the District Judge, and this list had to be supplemented from time to time so as to

[10] Louisiana Code of Criminal Procedure, *supra*, Title XVIII, c. 1.
[11] See note 3, *supra*.

maintain the required three hundred names. Although Petit Jurors are drawn from the general venire box after the names have been well mixed,[12] the law provides[13] that "the commission shall *select* . . . [from the general venire list] the names of twenty citizens, possessing the qualifications of grand jurors, . . ." [Italics supplied.] The twenty names out of which the challenged Grand Jury of twelve was drawn, actually were the first twenty names on a new list of fifty names supplied—on the day the Grand Jury List was selected—by the Jury Commission as a "supplement" to the general venire of three hundred. Thus, if colored citizens had been named on the general venire, they apparently were not considered, because the Commission went no further than the first twenty names on the supplemental list which itself contained no names of negroes. Furthermore, the uncontradicted evidence on the motion to quash showed that no negro had ever been *selected* for Grand Jury service in the Parish within the memory of any of the witnesses who testified on that point.

The testimony introduced by petitioner on his motion to quash created a strong *prima facie* showing that negroes had been systematically excluded—because of race—from the Grand Jury and the venire from which it was selected. Such an exclusion is a denial of equal protection of the laws, contrary to the Federal Constitution—the supreme law of the land.[14] "The fact that the testimony . . . was not challenged by evidence appropriately direct, cannot be brushed aside."[15] Had there been evidence obtainable to contradict and disprove the testimony offered

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[12] Louisiana Code of Criminal Procedure, *supra,* Title XVIII, c. 2, Art. 181.

[13] *Id.,* Art. 180.

[14] *Neal* v. *Delaware, supra,* 397; *Norris* v. *Alabama, supra,* 591; *Hale* v. *Kentucky, supra,* 616.

[15] *Norris* v. *Alabama, supra,* 594, 595.

by petitioner, it cannot be assumed that the State would have refrained from introducing it. The Jury Commissioners, appointed by the District Judge, were not produced as witnesses by the State. The trial judge, who had appointed the Commission, listening to the evidence and aided by a familiarity with conditions in the Parish of many years' standing, as judge, prosecutor and practicing attorney, concluded that negroes had been excluded from Jury service because of their race, and ordered the venire quashed and the box purged and refilled. Our examination of the evidence convinces us that the bill of exceptions which he signed correctly stated that petitioner "did prove at the trial of said motion to Quash that negroes as persons of color had been purposely excluded from the Grand Jury Venire and Panel which returned said indictment against . . . [petitioner] on account of their color and race, . . ."

Principles which forbid discrimination in the selection of Petit Juries also govern the selection of Grand Juries. "It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color." [16] This record requires the holding that the court below was in error both in affirming the conviction of petitioner and in failing to hold that the indictment against him should have been quashed. The cause is reversed and remanded to the Supreme Court of Louisiana.

Reversed.

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[16] *Virginia* v. *Rives*, *supra*, 322–3.

UNITED STATES *v.* JACOBS, EXECUTRIX.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 391. Argued February 2, 1939.—Decided February 27, 1939.

1. Under the Revenue Act of 1924, § 301, and substantially identical provisions of the Revenue Act of 1926, in determining the tax upon transfer of the net estate of a decedent, dying after the date of enactment, there is to be included in the gross estate the full value of property real or personal which was owned by the decedent and his wife as joint tenants at the time of his death but which was acquired with his funds, or was set up in part by his contribution and in part by a contribution from the wife of property which he had previously given her. Pp. 364, 371.
2. These provisions are applicable under the statute, and valid under the Fifth Amendment, notwithstanding that the joint tenancy was created before the approval of the Acts mentioned and before the enactment of the first estate tax law, in 1916. P. 366.
3. The tax is not retroactive, being imposed upon the occasion of the change of ownership and beneficial rights at the death of one of the joint tenants. P. 366.
4. Despite the common law distinctions between joint tenancies and tenancies by the entirety, there are substantial similarities which justified Congress in treating them alike for estate tax purposes. P. 370.
5. The presumption that an Act of Congress is valid applies with added force to a revenue Act. P. 370.

97 F. 2d 784, reversed; 99 *id.* 799, affirmed.

CERTIORARI, 305 U. S. 588, 593, to review affirmances below of two judgments of District Courts, in the one case allowing, and in the other denying, recovery of money exacted under a deficiency estate tax assessment. An opinion of the District Court in the second case is reported in 19 F. Supp. 56.

*Together with No. 482, *Dimock, Substituted Executor,* v. *Corwin, Late Collector of Internal Revenue,* on writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

Mr. Norman D. Keller argued the cause for the United States in No. 391 and respondent in No. 482. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* were on the briefs for the United States in No. 391 and respondent in No. 482. *Messrs. Carlton Fox* and *A. F. Prescott* also were on the brief for the United States in No. 391. *Messrs. Norman D. Keller* and *Edward J. Ennis* also were on the brief for respondent in No. 482.

Mr. Hugh W. McCulloch, with whom *Messrs. Frank H. McCulloch, Lewis C. Murtaugh,* and *Ned P. Veatch* were on the brief, for respondent in No. 391.

Mr. E. J. Dimock, with whom *Messrs. C. O. Donahue* and *J. D. Rawlings* were on the brief, for petitioner in No. 482.

Mr. Justice Black delivered the opinion of the Court.

No. 391.

The question is whether the entire value or only one-half the value of real property—purchased by a decedent with his own funds and held at his death by his wife and himself under a joint tenancy set up prior to 1916—may be included in the decedent's gross estate under the 1924 Revenue Act.

In 1909, real estate in Illinois was conveyed to W. Francis Jacobs, the decedent, and Elizabeth C. Jacobs, his wife, "as joint tenants" and this joint tenancy continued until decedent's death; the wife never contributed any part of, or consideration for, the joint property; decedent died June 17, 1924 (after the effective date of the 1924 Revenue Act), and as survivor the wife became sole owner in fee of the whole of the joint property.

The Commissioner included the full value of the property in decedent's gross estate for taxation under the 1924

Act. As executrix, respondent paid the tax, and sought recovery in the District Court which held that the estate tax could be imposed only upon one-half of the joint property's total value. The Circuit Court of Appeals affirmed.[1]

Respondent construes the 1924 Revenue Act as taxing—by its terms—only one-half the value of the joint property, and contends that inclusion of the property's entire value for estate tax purposes would as retrocative taxation violate the Due Process Clause of the Fifth Amendment.

First. It is clear that Congress intended, by § 302 of the 1924 Act,[2] to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety—irrespective of the date of the tenancy's creation—insofar as the property or consideration therefor is traceable to the decedent. Subdivision (h) of § 302 specifically provided that the provisions of § 302 relating to joint tenancies should "apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as . . . described

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[1] 97 F. 2d 784.

[2] The 1924 Act imposed a tax (§ 301, Act of 1924, 43 Stat. 253, 303) "upon the transfer of the net estate of every decedent dying after" the Act's enactment, and included (§ 302) in each gross estate the value of "the interest . . . [in property] held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, . . . except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person . . ."

therein, whether made, created, arising, existing, exercised, or relinquished *before or after the enactment of this Act.*" [Italics supplied.] Section 302 (h) was enacted in the 1924 Act after this Court, on May 1, 1922, had decided that the 1916 Act did not purport to impose an estate tax measured by the value of property held in joint tenancies created prior to the 1916 Act.[3] "The clear language of the 1924 statute repels the notion that it has no application to joint tenancies created prior to September 8, 1916." [4]

Second. Here, decedent paid the entire purchase price of the joint property with his own individual funds and, therefore, the 1924 statute required the inclusion of the full value of the joint property in his gross estate. Contending that the tax as so applied is retroactive, respondent insists that the Due Process Clause of the Fifth Amendment forbids such taxation. The reasoning is that a one-half interest in the joint property was transferred to, and vested in, the wife in 1909; that the tax in question only applies to transfers; and that the one-half interest transferred to the wife in 1909 could not thereafter (1924) be taxed as a part of decedent's gross estate without retroactively applying the tax to the 1909 transfer.

But the tax was not levied on the 1909 transfer and was not retroactive. At decedent's death in 1924, ownership and beneficial rights in the property which had

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[3] *Shwab* v. *Doyle,* 258 U. S. 529, 535; *Knox* v. *McElligott,* 258 U. S. 546, 549. Respondent relies upon language of the *Knox* case to support the contention that § 302 of the 1924 Act is retroactive in its effect on joint tenancies such as the one here. However, the actual judgment of the Court in that case went no further than to hold that the terms of the 1916 Act there considered did not require the inclusion—in gross estates—of the value of property held in joint tenancies created prior to the enactment of that particular law.

[4] *Gwinn* v. *Commissioner,* 287 U. S. 224, 226; cf., *Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160, 166.

existed in both tenants jointly changed into the single ownership of the survivor. This change in ownership, attributable to the special character of joint tenancies, was made the occasion for an excise, to be measured by the value of the property in which the change of ownership occurred. Had the tenancy not been created, this survivorship and change of ownership would not have taken place, but the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.[5]

Death duties or excises imposed upon the occasion of change in legal relationships to property brought about by death are ancient in origin.[6] Congress has the power to levy a tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a co-tenant. In holding that the full value of an estate by the entirety may constitutionally be included in a decedent's gross estate for estate tax purposes, this Court said: "The question . . . is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights . . .

"At . . . [the co-tenant's] death, however, and because of it, . . . [the survivor] for the first time, became

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[5] Cf., *Reynolds* v. *United States,* 292 U. S. 443, 449; *Cox* v. *Hart,* 260 U. S. 427, 435.

[6] See, *Knowlton* v. *Moore,* 178 U. S. 41, 47; 1 Cooley, "Taxation," § 48, (4th ed.); Seligman, "Essays in Taxation," Ch. V, (9th ed., 1921).

entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax." [7]

Thereafter, it was further decided that the full value of the property passing to a survivor under a tenancy by the entirety created prior to the estate tax of 1916 could be included in the gross estate.[8] Congress—it has been held—may also constitutionally apply an estate tax to the whole of a joint tenancy created after the 1916 Act,[9] and to half of a joint tenancy created prior to the 1916 Act, where the decedent alone had furnished consideration for the joint property.[10]

It is urged that these decisions do not support the tax here upon the full value of the joint property, because

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[7] *Tyler* v. *United States*, 281 U. S. 497, 503, 504.

[8] *Third National Bank & Trust Co.* v. *White*, 45 F. 2d 911, affirmed 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618.

[9] *Foster* v. *Commissioner*, 303 U. S. 618.

[10] *Gwinn* v. *Commissioner*, *supra*; *Griswold* v. *Helvering*, 290 U. S. 56, 58. In the *Griswold* case this Court said: "Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at an earlier date, which furnishes the basis for the tax."

this tenancy was created prior to the estate tax law of 1916. Respondent relies upon differences in the nature of tenancies by the entirety and joint tenancies in order to remove the present case from the application of these prior adjudications. Since a joint tenant's interest in realty is severable and subject to sale, the argument is that upon the death of a co-tenant the survivor actually receives nothing more than the decedent's one-half interest and therefore no more can be subjected to a death duty. On the other hand, respondent explains the permissible taxation of the whole of a tenancy by the entirety by reference to the "amiable fiction" [11] of the common law, under which ownership of a husband and wife in tenancy by the entirety is deemed a single individual unity and each owns all and every part of the property so held. By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the co-tenant, and therefore—it is said—all the property can be taxed.

The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions.[12] The Constitution grants

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[11] Cf., *Tyler* v. *United States, supra,* at 503.

[12] A joint tenancy in Illinois—where the property involved here is located—is described by that State's highest Court (as in the common law) as follows: "The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession." *Deslauriers* v. *Senesac,* 331 Ill. 437, 440; 163 N. E. 327. The "learning in the books merely shows that in case of a conveyance to husband and wife, there is a *fifth unity,* to wit: that of person . . ." *Topping* v. *Sadler,* V Jones (No. Car.) 357, 360. See note, 30 L. R. A. 305.

Congress the "Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare." No more essential or important power has been conferred upon the Congress and the presumption that an Act of Congress is valid applies with added force and weight to a levy of public revenue.[13]

In addition, there is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation. Practical necessities—and taxation is "eminently practical" [14]—may well have led Congress to group different types of joint ownership together for taxation rather than to afford different treatment to each varying shade of such ownership. A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person." [15] Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. The "grand incident of joint estate is the doctrine of *survivorship,* 'by which, when two or more persons are seized of a joint estate, . . . the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be.' " [16]

While it is true that until the death of decedent here each joint tenant possessed the right to sever the joint tenancy, each was nevertheless subjected to the hazard of losing the complete estate to the other as survivor. Prior to decedent's death, his wife had no right to dispose of her interest by will, nor could it pass to her legal

[13] *Nicol* v. *Ames,* 173 U. S. 509, 515.

[14] *Id.,* 516.

[15] 1 Tiffany, "Real Property" (1920), § 194; see, Littleton's "Tenures," § 291 (Wambaugh, ed., 1903).

[16] Freeman, "Cotenancy and Partition," 2nd ed., § 12.

heirs. She might survive and thereby obtain a complete fee to the property with attendant rights of possession and disposition by will or otherwise. Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest,[17] a decided change for the survivor's benefit. This termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax. Neither the amount of the tax nor its application to the survivor's change of status and ownership, was in any manner dependent upon the date of the joint tenancy's creation, whether before, or after, 1916. It is immaterial that Congress chose to measure the amount of the tax by a percentage of the total value of the property, rather than by a part, or by a set sum for each such change. The wisdom both of the tax and of its measurement was for Congress to determine.

No. 482.

No. 482 involves provisions of the 1926 Revenue Act (44 Stat. 9) substantially identical to those of the 1924 Act considered above. Here, also, a joint tenancy (in personal property) was created by man and wife prior to 1916. However, not all of the joint property was contributed by the decedent, but a portion was contributed to the tenancy by the wife who survived. This property

[17] Cf., *Chase National Bank* v. *United States*, 278 U. S. 327, 338; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271.

which she transferred to the tenancy had in turn been previously given to her—without consideration—by decedent before the creation of the joint tenancy. At decedent's death in 1930, an estate tax was assessed and paid upon the full value of the joint property, including that part contributed by the survivor but ultimately traceable to the decedent.

The District Court held that the full value of the joint property was taxable,[18] and the Circuit Court of Appeals affirmed.[19]

The contention that the 1926 tax is unconstitutional under the Fifth Amendment because imposed upon the total value of the joint tenancy at decedent's death is without merit, for reasons stated in No. 391.

However, there is here the further argument that the courts below erred in construing the 1926 Act to require the inclusion in the gross estate of that part of the joint property (shares of stock) contributed to the joint tenancy by the survivor, but which had been paid for and given to her by decedent prior to the creation of the tenancy.

Although subdivision (h) of § 302 of the 1926 Act specifically required inclusion in the gross estate of the full value of the joint property at death in proportion to the decedent's contribution to the purchase price, petitioner relies upon that part of subdivision (e) which excepts "such part [of the joint property] . . . as may be shown to have originally belonged to . . . [the survivor] and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth." Petitioner insists that this exception should be read "except such parts thereof as may be shown to have originally belonged to [the sur-

[18] 19 F. Supp. 56.

[19] 99 F. 2d 799.

vivor] and never *after the passage of this Act* to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth."

The surviving joint tenant in this case comes squarely within the governing statutory provision because she "received" and "acquired" all of the property contributed by her to the joint tenancy "from the decedent for less than an adequate and full consideration in money or money's worth." This language adopted by Congress clearly and unambiguously indicates the purpose to tax the entire value of a joint tenancy under circumstances shown by this record. We are without authority to add language to the statute directly contrary to such a clearly expressed purpose.

The judgment in No. 391 is reversed and that in No. 482 is affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of these cases.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER, and MR. JUSTICE ROBERTS think that the judgment in No. 391 should be affirmed and that in No. 482 should be reversed.

It has long been the settled doctrine of this court that Congress cannot retroactively tax, as testamentary, a transfer consummated in accordance with existing law before the adoption of a system of estate taxation, and where the parties, at the time of the transaction, had no notice of intent to tax it as a transfer in contemplation of death or to take effect in possession or enjoyment at or after death.[1] In order to avoid holding taxing acts

[1] *Nichols* v. *Coolidge*, 274 U. S. 531; *Helvering* v. *Helmholtz*, 296 U. S. 93, 97; *White* v. *Poor*, 296 U. S. 98, 102.

unconstitutional on this ground, the court has often construed them as applying prospectively only.[2] Reliance is placed by the Government on decisions sustaining inclusion in the estate of one spouse of the entire value of an estate by the entireties. In the earlier cases wherein the exaction was upheld the act operated prospectively and affected only such an estate arising after passage of the statute,[3] or the estate came into being after the adoption of a system of taxation which might well include such a transfer within its scope.[4] Subsequently the inclusion of the entire value in the taxable estate of one spouse was sustained where the tenancy by the entireties antedated the passage of the estate tax acts.[5] The decision was based upon the peculiar nature of a tenancy by the entireties as expounded in *Tyler* v. *United States.* A transfer tax measured by one-half the value of an estate in joint tenancy has been approved although the estate was created prior to the adoption of the system of estate taxes; [6] but the court has never passed upon the validity of such a tax measured by the value of the entire joint estate. There are marked differences between a tenancy by the entireties and a joint tenancy in respect of the power of one tenant to destroy the joint estate, to transfer or encumber his interest and otherwise obtain the fruits of it. In order to prevent evasion Congress may include the value of the entire estate in the gross estate as a measure of the tax where the estate originates after

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[2] *Shwab* v. *Doyle,* 258 U. S. 529; *Knox* v. *McElligott,* 258 U. S. 546; *Union Trust Co.* v. *Wardell,* 258 U. S. 537; *Levy* v. *Wardell,* 258 U. S. 542; *Lewellyn* v. *Frick,* 268 U. S. 238.

[3] *Tyler* v. *United States,* 281 U. S. 497.

[4] *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160.

[5] *Third National Bank & Trust Co.* v. *White,* 287 U. S. 577; *Helvering* v. *Bowers,* 303 U. S. 618.

[6] *Knox* v. *McElligott, supra; Gwinn* v. *Commissioner,* 287 U. S. 224; *Cahn* v. *United States,* 297 U. S. 691.

adoption of the law.[7] But it may not retroactively apply such measure to an estate created at a time when its creators had no reason to expect that such a tax would be laid in view of the settled rules of property.

HALE, CHAIRMAN, ET AL. v. BIMCO TRADING, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 418. Argued February 6, 1939.—Decided February 27, 1939.

1. Plaintiffs in the federal court secured a decree enjoining state officers from enforcing a state statute as unconstitutional. A proceeding of mandamus, to which they were not parties, was pending before the state supreme court in which the same officers had been commanded to execute the statute, as valid. Further action in the mandamus case was suspended by the state court to await final decision of the constitutional question by this Court on appeal in the injunction suit. *Held* that Jud. Code § 265, 28 U. S. C. § 379, which provides that a writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, is inapplicable. P. 378.
2. State legislation providing standards for all cement sold or used in the State, and requiring inspection and imposing an "inspection fee" of fifteen cents per hundredweight—sixty times the cost of inspection—in respect of cement imported from abroad, 30% of the cement sold or used in the State, whilst requiring no inspection and exacting no fee in respect of domestic cement—*held* invalid under the commerce clause of the Constitution. Pp. 378, 380.

Affirmed.

APPEAL from a decree of the District Court of three judges which enjoined the appellants, members of the State Road Department of Florida, from enforcing a Florida statute. The court below filed no opinion.

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[7] See *Nichols* v. *Coolidge, supra,* p. 542; *Tyler* v. *United States, supra,* p. 505; *Helvering* v. *City Bank Co.,* 296 U. S. 85, 90.

Messrs. H. E. Carter, Assistant Attorney General of Florida, and *Patrick C. Whitaker,* with whom *Messrs. George Couper Gibbs,* Attorney General, and *Tom Whitaker* were on the brief, for appellants.

Messrs. Martin H. Long and *R. R. Saunders* were on a brief for appellees.

By leave of Court, *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Alfred Brunson MacChesney, Warner W. Gardner,* and *Alger Hiss* filed a brief on behalf of the United States, as *amicus curiae,* in support of the decree.

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here on appeal, under § 266 of the Judicial Code (28 U. S. C. § 380), to review the final decree of a three-judge District Court enjoining appellants, constituting the State Road Department of Florida, from enforcing against appellees relevant provisions of a Florida statute. Acts 1937, c. 18995, Fla. Comp. Gen. Laws, c. CVIII, § 4151 (512)–(519). The statute provides for the inspection of all imported cement and the payment for such inspection of a fee of fifteen cents per hundred pounds. A motion to dismiss the bill having been overruled and appellants having elected to stand on the bill, a final decree was duly entered.

At the threshold, a challenge to the jurisdiction of the District Court must be met. It derives from § 265 of the Judicial Code (28 U. S. C. § 379), for it is claimed that the injunction in effect stayed proceedings in the Supreme Court of Florida. Disposition of this claim entails a quick narrative of the course of litigation disclosed by the record.

On July 29, 1937, a petition for mandamus was filed in the Supreme Court of Florida by the State of Florida ex

rel. Florida Portland Cement Company to compel appellants, members of the State Road Department, to enforce the statute in question, and on the same day an alternative writ of mandamus was issued. Appellants' demurrer, raising the constitutionality of the statute, was overruled on October 12, 1937. *State* v. *Hale,* 129 Fla. 588; 176 So. 577. A peremptory writ of mandamus, on November 17, 1937, directed appellants to enforce the statute. Meanwhile, on November 4, 1937, appellee Bimco Trading, Inc. filed its bill of complaint in this suit to enjoin the enforcement of the statute as forbidden, *inter alia,* by Article I, § 8, cl. 3, and Article I, § 10, cl. 2, of the Constitution. On November 27, 1937, the District Court granted an interlocutory injunction restraining appellants from enforcing the statute. Thereafter, appellants moved the Supreme Court of Florida to stay the mandamus proceedings pending an appeal to this Court from the order of the District Court, and on December 9, 1937, the Florida court ordered "that all further proceedings and actions taken pursuant to the peremptory Writ of Mandamus heretofore issued in this cause, be and the same is hereby stayed until the final decision of the Supreme Court of the United States upon the constitutionality of the act involved in this cause and until the further order of this Court." This cause was then prosecuted with dispatch. On March 8, 1938, appellants' motion to dismiss, which had been filed on November 24, 1937, was overruled, and, appellants refusing to plead over, the District Court, on June 14, 1938, entered a final decree permanently enjoining the enforcement of the statute.

To invoke § 265 in these circumstances is to assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of

strangers to the state court proceedings. This assumes that the mandamus proceeding bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so. *Chase National Bank* v. *Norwalk,* 291 U. S. 431, 441.

Appellants are in effect contending that no proceedings are here available to bring the constitutionality of the Florida statute before this Court, once the state court directed its enforcement. The Supreme Court of Florida itself manifested no such strangling conception of § 265. It did not deem the proceedings initiated below as a denial of the right of way of a state court through an obstructive exercise of authority by a United States court. On the contrary, in staying "all further proceedings and actions" until this Court had finally passed upon its constitutionality, the Supreme Court of Florida recognized the propriety of the present proceedings as an orderly mode for invoking the ultimate judicial voice on constitutional issues. Therefore, § 265 has no relevance here. That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter. *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 183. The present record presents no occasion for bringing this safeguard into play.

We turn, therefore, to the merits.

After reciting that "during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported"; that cement is "an integral part of the construction" of "large numbers" of buildings; that "much of the foreign manufactured cement . . . brought into the State of Florida has been of inferior

quality"; that "the importation . . . and . . . use of foreign cement not only jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida," the legislature of that State, in 1937, enacted the statute in controversy. Section 1 authorizes the State Road Department of Florida "to fix a minimum standard for all cement offered for sale or sold or used" within the State. Section 2 enforces obedience to standards of quality thus to be set by the Department by provisions for inspection and for exaction of an inspection fee of fifteen cents per hundredweight. It is this section which gives the statute teeth. But this section—the scheme for inspection and for the inspection fee—applies only to "cement imported or brought into the State of Florida from any foreign country . . ." The statute thus renders the 70% domestic cement immune from its requirements of inspection and its attendant fee. According to the uncontested allegation of the bill of complaint, this inspection fee is "sixty times the actual cost of inspection." Apart from this allegation, the Government, appearing as *amicus* and more particularly on behalf of the national interest represented by the Trade Agreements Act (48 Stat. 943; 19 U. S. C. § 1351), gives perspective to the size of the fifteen cent fee by comparing it with the duty of six cents per one hundred pounds fixed by the Hawley-Smoot Act of 1930 (46 Stat. 590, 602; 19 U. S. C. § 1001, par. 205 (b)), and with the duty of four and one-half cents fixed by the Belgian Trade Agreement of 1935 (49 Stat. 3680, 3691; 19 U. S. C. § 1351).

As grounds for this discrimination in the incidence of an obviously onerous exaction as between foreign and domestic cement, the preamble of the statute states that "it is of paramount importance to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida,"

and that the importation "amounts to unfair competition being forced on this great industry in Florida." So far as public safety demands certain standards in the quality of cement, such safety is dependent on assurance of that quality by appropriate inspection no less of the 70% domestic cement than of the 30% obtained from abroad. That no Florida cement needs any inspection while all foreign cement requires inspection at a cost of fifteen cents per hundredweight is too violent an assumption to justify the discrimination here disclosed. The other justification—the competitive effect of foreign cement in the Florida market—is rather a candid admission that the very purpose of the statute is to keep out foreign goods. The Supreme Court of Florida gives no reason resting in local conditions for what appears to be a transparent discrimination in the imposition of heavy inspection fees as between imported and domestic cement, and none has been offered by appellants. The context of a particular statute may justify distinctive treatment of phases of interstate or foreign commerce. The circumstances may negative apparent discrimination in the difference of treatment. Such was the situation in *McLean & Co.* v. *Denver & Rio Grande R. Co.,* 203 U. S. 38, referred to by the Florida Supreme Court. But this is not that kind of a case. According the statute every presumption of validity, no reasonable conjecture can here overcome the calculated discrimination against foreign commerce.

Such assumption of national powers by a state has, ever since March 12, 1827 (*Brown* v. *Maryland,* 12 Wheat. 419), been found to be in collision with the Constitution. It can never be pleasant to invalidate the enactment of a state, particularly when it bears the imprimatur of constitutionality by the highest court of the state. But it would not be easy to imagine a statute more clearly designed than the present to circumvent what the Com-

merce Clause forbids. *Cook* v. *Pennsylvania,* 97 U. S. 566; *Voight* v. *Wright,* 141 U. S. 62. This makes it unnecessary to consider the objections urged under Article I, § 10, cl. 2.

The decree of the District Court is

Affirmed.

KEIFER & KEIFER *v.* RECONSTRUCTION FINANCE CORP. AND REGIONAL AGRICULTURAL CREDIT CORP.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 364. Argued January 31, 1939, February 1, 1939.—Decided February 27, 1939.

1. A Regional Agricultural Credit Corporation, chartered by the Reconstruction Finance Corporation by authority of § 201 (e) of the Emergency Relief and Construction Act of 1932, and which under that statute is government-financed and managed and empowered to make loans to farmers and stockmen for agricultural purposes or for raising and marketing livestock—*held* subject to suit. Pp. 392, *et seq.*

   Neither the statute nor the charter explicitly rendered the Credit Corporation amenable to suit; but among the corporate powers granted the Finance Corporation by the Act creating it was authority "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, state or federal."

2. Whether a governmental corporation is endowed with the Government's immunity from suit depends upon the congressional purpose in creating it. P. 388.

   Immunity is not necessarily to be inferred from the fact that the corporation is doing the Government's work or from the omission of the conventional sue-and-be-sued clause from its charter.

3. Liability to suit of Regional Agricultural Credit Corporations, chartered through the Reconstruction Finance Corporation, is to be inferred from the numerous instances in which Congress, when creating other corporations for purposes not relevantly different from those of the Credit Corporations, has expressly included authority to sue and be sued. This uniform practice reveals a

definite policy which should be given hospitable scope. Failure to include express authority to sue and be sued in the exceptional case of the Credit Corporations is explained by an assumption on the part of Congress that that authority would pass to them from the Reconstruction Corporation already endowed with it. P. 390.

4. Recovery against a Regional Agricultural Credit Corporation for damages resulting from its negligence in failing to provide proper care for livestock delivered to it under a contract of bailment, may be had in contract. P. 394.
5. In the light of recent congressional legislation, liability of a government corporation empowered generally "to sue and be sued" is not confined to suits sounding only in contract. P. 396.

97 F. 2d 812, reversed.

CERTIORARI, 305 U. S. 588, to review the affirmance of a judgment of the District Court (22 F. Supp. 918) dismissing on demurrer an action for damages against the two federal corporations above named. The question brought up by the certiorari concerns only the claim advanced for the Regional Agricultural Credit Corporation that it is immune from suit.

Mr. Ernest B. Perry, with whom *Mr. Robert Van Pelt* was on the brief, for petitioner.

Congressional intent that the "Regional" be subject to suit is expressed by selection of a corporation itself subject to suit to form the "Regional." *Casper* v. *Regional Agricultural Credit Corp.,* 202 Minn. 433.

Such intent is also manifested by the direction that the "Regional" be formed as a corporation. *Bank of U. S.* v. *Planters' Bank,* 9 Wheat. 904; *Federal Sugar Refining Co.* v. *U. S. Sugar Eq. Board,* 268 F. 575; *Sloan Shipyards Corp.* v. *U. S. Shipping Board,* 258 U. S. 549; *U. S. Shipping Board* v. *Tabas,* 22 F. 2d 398; *U. S. Shipping Board* v. *Eichberg,* 14 F. 2d 248; *United States* v. *McCarl,* 275 U. S. 1; *North Dakota-Montana Wheat Assn.* v. *United States,* 66 F. 2d 573; *Phillips* v. *U. S. Grain Corp.,* 279 F. 244; *U. S. Grain Corp.* v. *Phillips,* 261 U. S. 106; *Salas* v.

United States, 234 F. 842; *Panama Ry. Co.* v. *Curran,* 256 F. 768; *Panama Ry. Co.* v. *Minnix,* 282 F. 47; *Olson* v. *U. S. Spruce Corp.,* 276 U. S. 462; *United States* v. *Deutsches Kalisyndikat Gesellschaft,* 31 F. 2d 199; *Becker Steel Co.* v. *Cummings,* 296 U. S. 74.

Such intent is implied in the nature of the business the "Regional" was directed to transact. Title 15, § 605B (e) U. S. C.; c. 520, § 201 (e), 47 Stat. 713; *Bank of U. S.* v. *Planters Bank,* 9 Wheat. 904; *U. S. Shipping Board* v. *Harwood,* 281 U. S. 519; *Standard Oil Co.* v. *United States,* 25 F. 2d 480; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636; *Central Market* v. *King,* 132 Neb. 380; 302 U. S. 687; *Federal Land Bank* v. *Priddy,* 295 U. S. 229; *North Dakota* v. *Olson,* 33 F. 2d 848; *Gross* v. *Kentucky Board,* 105 Ky. 840.

Such intent is expressed by inclusion of the word "Corporation" in the name of the respondent. *Dartmouth College* v. *Woodward,* 4 Wheat. 518; *Martin* v. *Kentucky Lands Inv. Co.,* 146 Ky. 525; *Barrow S. S. Co.* v. *Kane,* 170 U. S. 100; *Tulare Irrigation Dist.* v. *Shepard,* 185 U. S. 1; *Gilligan* v. *John Gilligan Co.,* 94 Neb. 437.

Immunity of the sovereign from suit does not extend to agents, no agent being an agent for the purpose of committing a tort. *McComb* v. *U. S. Housing Corp.,* 264 F. 589.

Mr. Peyton R. Evans, with whom *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney, Edward J. Ennis,* and *Arthur C. Bernard* and *May T. Bigelow* were on the brief, for respondents.

Instrumentalities of the Federal Government, of which Regional unquestionably is one, are immune from suit, as well as the United States itself, *Lynch* v. *United States,* 292 U. S. 571, 582; cf. *Kawananakoa* v. *Polyblank,* 205 U. S. 349, unless by statute Congress has subjected them

to suit. *Federal Lank Bank* v. *Priddy,* 295 U. S. 229, 231; *Missouri Pacific R. Co.* v. *Ault,* 256 U. S. 554; *The Lake Monroe,* 250 U. S. 246, 249; cf. *The Western Maid,* 257 U. S. 419, 433. There is no distinction between suits against the Government and suits against the property of the United States. *Stanley* v. *Schwalby,* 147 U. S. 508, 512; *Carr* v. *United States,* 98 U. S. 433; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *United States* v. *Griffin,* 303 U. S. 226, 239; *United States* v. *Michel,* 282 U. S. 656, 659; *Price* v. *United States,* 174 U. S. 373, 375–376.

Congress has not expressly subjected regionals to suit either in the statute, its history, or in the charter.

Immunity can not be destroyed by the mere inference from the suability of R. F. C. Moreover, the fact that Congress authorized creation of regionals by R. F. C. instead of by the Farm Credit Administration or some other government agency not subject to suit does not support such an inference, because there is no particular or special relation between the power of R. F. C. to create regionals and its power to sue and be sued. There is no more reason to infer that Congress intended that this attribute of suability should pass from R. F. C. to regionals than to infer that any of the other powers of R. F. C., such as its power to create regionals, passed to regionals.

The general rule that a grant of corporate existence implies liability to suit has no application to corporate instrumentalities of the Federal Government which are immune from suit unless this sovereign immunity is abandoned by statute clearly and expressly and not by implication. The presumption of immunity from suit (*Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686) and the sovereign character of this immunity forbid the view that the mere corporate form of the government instrumentality implies that Congress intended to subject it to suit.

In cases relied on by petitioner the corporations were incorporated under statutes containing express provisions for suability (*Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549) or the Government was merely an incorporator or stockholder in a corporation formed under general laws giving the corporation power to sue and be sued. *United States Bank* v. *Planters Bank,* 9 Wheat. 904.

Nothing in the business which regionals were directed to transact and nothing in the present transaction indicates that Congress intended that regionals, engaged in a public and governmental activity, should be subject to suit.

The petitioner's argument that, even in the absence of an expressed intent, the sovereign's intent to waive immunity from suit may be inferred from the type of activity involved, whether governmental or proprietary, may be applicable to instrumentalities of a state government, but has no application to instrumentalities of the Federal Government which engage only in governmental activities and activities incidental thereto. *Helvering* v. *Gerhardt,* 304 U. S. 405, 411; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, 408; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 211; *Osborn* v. *United States Bank,* 9 Wheat. 738. *Federal Land Bank* v. *Priddy,* 295 U. S. 229, distinguished.

Congress has not subjected Regional to suit in tort.

A judgment against Regional would compel it to pay out a sum of money from the public funds in the Treasury of the United States. Such a judgment would have the same effect as if it were rendered directly against the United States for the amount specified. The jurisdiction of a court over such an action is governed by the same rule which determines the court's jurisdiction over a suit against the Government itself. *Smith* v. *Reeves,* 178 U. S. 436, 439.

The present case is an action for tort, and does not rest upon a contract, express or implied. An action will not

lie against the United States for the misfeasance or nonfeasance of its officers or agents. *Gibbons* v. *United States,* 8 Wall. 269, 274; *Langford* v. *United States,* 101 U. S. 341, 345; *Schillinger* v. *United States,* 155 U. S. 163, 169; *Russell* v. *United States,* 182 U. S. 516, 530; *Harley* v. *United States,* 198 U. S. 229, 234; *Peabody* v. *United States,* 231 U. S. 530, 539.

The statutory liability to suit must be regarded as confined to matters within the scope of the corporate powers of the government agency—not unauthorized wrongs upon individuals. *Lyle* v. *National Home,* 170 F. 842; *Overholser* v. *National Home,* 68 Ohio St. 236. The rule of the *National Home* cases has recently been applied to actions in tort against the Home Owners' Loan Corporation, in *Henson* v. *Eichorn,* 24 F. Supp. 842; *Prato* v. *Home Owners' Loan Corp.,* 24 F. Supp. 844; contra, *Herman* v. *Home Owners' Loan Corp.,* 120 N. J. L. 437; *Pennel* v. *Home Owners' Loan Corp.,* 21 F. Supp. 497; and see *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726.

In England it is settled law that corporations established by the Government for governmental purposes, deriving their funds entirely from the Government, are "servants of the Crown," and "that the presence or absence of incorporation made no difference to the proposition that the heads of government departments are not responsible for the [tortious] acts of subordinates." *Roper* v. *Commissioners,* [1915], 1 K. B. 45, 52.

The legislature does not consent to actions in tort against a state governmental corporation, merely by conferring upon the corporation the power to sue and be sued. *White* v. *Alabama Insane Hospital,* 138 Ala. 479; *Leavell* v. *Western Kentucky Asylum,* 122 Ky. 213; *Maia's Adm.* v. *Eastern State Hospital,* 97 Va. 507; *Smith* v. *New York,* 227 N. Y. 405; *Yolo* v. *Modesto Irrigation Dist.,* 216 Cal. 274; *Bush* v. *Highway Commission,* 329 Mo. 843.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Court took this case for review because an important question of federal law called for settlement, particularly in view of a conflict between the court below and the Supreme Court of Minnesota. *Casper* v. *Regional Agricultural Credit Corp.*, 202 Minn. 433; 278 N. W. 896. The question is whether a Regional Agricultural Credit Corporation, in the circumstances presently to be stated, is immune from suit.

On July 21, 1932, Congress enlarged the powers of the Reconstruction Finance Corporation (hereafter called "Reconstruction") established early that year, Act of January 22, 1932, c. 8, 47 Stat. 5, by authorizing it, among other things, to create regional agricultural credit corporations "in any of the twelve Federal land-bank districts." Emergency Relief and Construction Act of 1932, § 201 (e), c. 520, 47 Stat. 709, 713. Each corporation was to have a paid-up capital of not less than $3,000,000 to be subscribed for by Reconstruction, was to be managed by appointees of Reconstruction, and was empowered to make loans to farmers and stockmen for agricultural purposes or for raising and marketing livestock. Accordingly, on September 10, 1932, Reconstruction chartered the Regional Agricultural Credit Corporation of Sioux City, Iowa (hereafter called "Regional"). Regional, in due exercise of its powers, entered into so-called cattle-feeding contracts, whereby it undertook to provide sufficient feed and water for livestock with appropriate security for rendering these services. Failure through negligence to provide proper care for cattle delivered under this arrangement, with resulting damage to the livestock, is the basis of this suit brought by petitioner, plaintiff below, against Reconstruction and Regional. Both de-

fendants demurred on several grounds, of which challenge to the jurisdiction of the court is alone pertinent here. The District Court sustained the demurrers and dismissed the suit. 22 F. Supp. 918. The Court of Appeals affirmed, holding for Reconstruction because its control of Regional had been transferred by Executive Order (No. 6084, dated March 27, 1933, effective May 27, 1933) to the Farm Credit Administration prior to the alleged cause of action, and for Regional because it was found immune from suit. 97 F. 2d 812. Certiorari was granted, directed solely to the latter issue. 305 U. S. 588.

The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication. *Monaco* v. *Mississippi,* 292 U. S. 313, 321. For present purposes it is academic to consider whether this exceptional freedom from legal responsibility rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives, cf. *Langford* v. *United States,* 101 U. S. 341, 343, or on a metaphysical doctrine "that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353. But because the doctrine gives the government a privileged position, it has been appropriately confined.[1]

Therefore, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. *United States* v. *Lee,* 106 U. S. 196, 213, 221; *Sloan Shipyards*

[1] See Professor Borchard's bibliography in (1934) 20 A. B. A. J. 747, 748, and the collection of authorities in Judge Mack's opinion in *The Pesaro,* 277 F. 473, rev'd, 271 U. S. 562.

v. *U. S. Fleet Corp.*, 258 U. S. 549, 567. For more than a hundred years corporations have been used as agencies for doing work of the government. Congress may create them "as appropriate means of executing the powers of government, as, for instance, . . . a railroad corporation for the purpose of promoting commerce among the States." *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529. But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability like unto indispensable words of early common law, such as "*warrantizo*" or "to A and his heirs," for which there were no substitutes and without which desired legal consequences could not be wrought. Littleton, Tenures (Wambaugh ed.) §§ 1, 733.

Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so? *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231. Cf. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412n. This is our present problem. Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends.[2] In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included.[3] Such a firm practice is partly

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[2] See Thurston, Government Proprietary Corporations; Van Dorn, Government Owned Corporations; McDiarmid, Government Corporations and Federal Funds; Field, *Government Corporations: A Proposal* (1935) 48 Harv. L. Rev. 775; McIntyre, *Government Corporations as Administrative Agencies: An Approach* (1936) 4 Geo. Wash. L. Rev. 161.

[3] The American Legion, 41 Stat. 284, 285; Foreign Banking Corporations, 41 Stat. 378, 379; China Trade Act Corporation, 42 Stat. 849, 851; Belleau Wood Memorial Association, 42 Stat. 1441; Federal Intermediate Credit Banks, 42 Stat. 1454, 1455; National Agricultural Credit Corporations, 42 Stat. 1454, 1462; The Grand Army of the Republic, 43 Stat. 358, 359; Inland Waterways Corporation, 43 Stat. 360, 362; The United States Blind Veterans of the World War, 43 Stat. 535, 536; American War Mothers, 43 Stat. 966, 967; Textile Foundation, 46 Stat. 539, 540; Reconstruction Finance Corporation, 47 Stat. 5, 6; Disabled American Veterans of the World War, 47 Stat. 320, 321; Federal Home Loan Bank, 47 Stat. 725, 735; Tennessee Valley Authority, 48 Stat. 58, 60; Corporation of Foreign Security Holders, 48 Stat. 92, 93; Home Owners' Loan Corporation, 48 Stat. 128, 129; Federal Deposit Insurance Corporation, 48 Stat. 162, 172; Production Credit Corporations, Production Credit Associations, Central Bank for Coöperatives, Regional Banks for Cooperatives, 48 Stat. 257, 266; Federal Farm Mortgage Corporations, 48 Stat. 344, 345; Cairo Bridge Commission, 48 Stat. 577, 581; Port Arthur Bridge Commission, 48 Stat. 1008, 1009; Federal Credit Union, 48 Stat. 1216, 1218; Federal Savings & Loan Insurance Corporation, 48 Stat. 1246, 1256; National Mortgage Associations, 48 Stat. 1246, 1253; American National Theater and Academy, 49 Stat.

an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope.[4] It is noteworthy that the oldest surviving government corporation—the Smithsonian Institution—has several times been in the law courts, even in the absence of explicit authority and although the general feeling regard-

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457, 458; Federal Housing Administrator, 49 Stat. 684, 722; Veterans of Foreign Wars of the United States, 49 Stat. 1390, 1391; Disaster Loan Corporation, 50 Stat. 19; Farmers' Home Corporation, 50 Stat. 527; Marine Corps League, 50 Stat. 558, 559; Owensboro Bridge Commission, 50 Stat. 641, 645; Southeastern University, 50 Stat. 697, 698; American Chemical Society, 50 Stat. 798, 799, 800 (semble); United States Housing Authority, 50 Stat. 888, 889, 890; Federal Crop Insurance Corporation, 52 Stat. 72, 73; Niagara Falls Bridge Commission, 52 Stat. 767, 770.

This list does not include, of course, the government corporations chartered under general state or District of Columbia incorporation laws. *Sloan Shipyards* v. *U. S. Fleet Corp., supra.*

[4] Mr. Justice Holmes, on Circuit, gave pioneer expression to inferences to be drawn from legislative policy. "A statute," he wrote in *Johnson* v. *United States,* 163 F. 30, 32 (C. C. A. 1st), "may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." See also, Taft, C. J., in *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 385–389; Sutherland, J., in *Funk* v. *United States,* 290 U. S. 371, 381; Cardozo, J., in *Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 350–351; Lord Birkenhead, L. C., in *Bourne* v. *Keane* [1919] A. C. 815, 830; Stone, *The Common Law in the United States* (1936) 50 Harv. L. Rev. 4, 13; Landis, *Statutes and the Sources of Law,* Harvard Legal Essays, p. 213.

ing governmental immunity was very different in 1846 from what it has become in our own day. 9 Stat. 102. *Smithsonian Institute* v. *Meech,* 169 U. S. 398; *Smithsonian Institute* v. *St. John,* 214 U. S. 19.

Only two instances have been brought to the Court's attention in which Congress has not explicitly rendered its recent corporate creations amenable to suit. These are the Regionals and the Federal Savings and Loan Associations. 48 Stat. 128, 132–134. It is significant that neither of these classes of corporations was the direct emanation of Congress or the offspring of a general incorporation law under Congressional authority. *Sloan Shipyards* v. *U. S. Fleet Corp., supra.* Each was to come into being through an organ that had theretofore been created by Congress. We put the Federal Savings and Loan Associations to one side, because they are not now before the Court.[5] But the circumstances attending the origination of Regional make it manifest that it was within the considerations that have uniformly led Congress to make its immediate corporate creatures subject to suit. The genesis, functions, and affiliations of Regional all negative the assumption that in its operations it was to be without the law.

Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general corporate powers including authority "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." 47 Stat. 5, 6. When later Congress authorized Reconstruction to create these Regional Agricultural Credit Corporations, it did so by

[5] It is to be noted that the progenitor of these Associations—the Federal Home Loan Bank Board—is not itself a corporation. But see *Sloan Shipyards* v. *U. S. Fleet Corp., supra,* in which the Fleet Corporation was found subject to suit although Congress authorized its creation through the President.

outlining in a single section of a comprehensive statute the broad scope of this added power for Reconstruction. 47 Stat. 709, 713.[6] Congress naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being. Such, certainly, has been the practical construction of the Regional Agricultural Credit Corporations in the instinctive pursuit of their enterprise. See, e. g., *Hallenbeck* v. *Regional Agricultural Credit Corp.*, 47 Ariz. 477; 56 P. 2d 1041; *Regional Agricultural Credit Corp.* v. *Elston, Prince & McDade,* 183 So. 91 (La.). Cf. *Lewis* v. *Regional Agricultural Credit Corp.*, 92 F. 2d 1008 (C. C. A. 10th). To imply for Regionals a unique legal position compared with those corporations to whose purposes Regional is so closely allied,[7] is to infer Congressional idiosyncrasy. There is a much more sensible explanation for the failure of Congress to bring Regional by express terms within its emphatic practice not to confer sovereign immunity upon these government corporations. Congress had a right to assume that the characteristic energies for corporate enterprise with which

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[6] Section 201 (e) of the statute, providing for Regional Agricultural Credit Corporations, covers less than half a page of a fifteen-page statute.

[7] See, e. g., Federal Land Banks, 39 Stat. 360, 363; Joint Stock Land Banks, 39 Stat. 360, 374; Federal Intermediate Credit Banks, 42 Stat. 1454, 1455; National Agricultural Credit Corporations, 42 Stat. 1454, 1462; Production Credit Corporations, Production Credit Associations, Central Bank for Coöperatives, Regional Banks for Cooperatives, 48 Stat. 257, 266; Federal Farm Mortgage Corporations, 48 Stat. 344, 345; National Mortgage Associations, 48 Stat. 1246, 1253. Congress itself recognized the identity of purpose in these various corporations. 48 Stat. 267, 268. Note, too, that Production Credit Corporations, successors to Regional Agricultural Credit Corporations are subject to suit. 48 Stat. 257, 266.

a few months previously it had endowed Reconstruction would now radiate through Reconstruction to Regional.

To give Regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice.

The legal position of Regional is, therefore, the same as though Congress had expressly empowered it "to sue and be sued." The scope of this liability remains to be explored.

Regional claims immunity in any event because Congress has not subjected it to suit "in tort." It is assumed that the present action is not one upon a contract, express or implied, and, therefore, outside the purview of "to sue and be sued." The premise is not valid, nor does the conclusion follow.

The transaction which gave rise to the controversy was a bailment of livestock for hire, and the cause of action lack of reasonable diligence by the bailee. Ever since the fifteenth century, according to Maitland, there were "actions against bailees for negligence in the custody of goods entrusted to them, and here also it was necessary to allege an assumpsit"—the having undertaken to do something. Maitland, Equity, Lecture VI, pp. 362, 363; Maitland, The Forms of Action at Common Law, Lecture VI, pp. 68, 69. That Regional's failure properly to feed and water the livestock entrusted to it by the cattle-feeding contract was not a wrong disassociated from carrying out the very transaction which brought it into existence, is evident from the recognized liability of the United States itself as lessee and bailee even under the

explicit restrictions of the Court of Claims Acts.[8] Both this Court and the Court of Claims have sustained actions not dissimilar from the present. They have recognized that the breach of implied duty of a lessee "not to commit waste, or suffer it to be committed," *United States* v. *Bostwick,* 94 U. S. 53, 68, and of a bailee not to neglect "to exercise ordinary care and skill," *Gulf Transit Co.* v. *United States,* 43 Ct. Cl. 183, 199, are duties that have their source in contract even though the guilty agents may be merely tort-feasors. To be sure, the common law fiction of waiving the tort and suing in assumpsit cannot be used as an evasion of the limited liability created by the Court of Claims Acts. *Bigby* v. *United States,* 188 U. S. 400; *United States* v. *Minnesota Investment Co.,* 271 U. S. 212, 217. But where the wrong really derives from an undertaking, to stand on the undertaking and to disregard the tort is not to invoke a fictive agreement. It merely recognizes a choice of procedural vindications open to the injured party.

To assume that Congress in subjecting these recently created governmental corporations to suit meant to enmesh them in these procedural entanglements, would do violence to Congressional purpose. When it chose to do so, Congress knew well enough how to restrict its consent to suits sounding only in contract, even with all the controversies in recondite procedural learning that this might entail. It did so with increasing particularity in the successive Court of Claims Acts. 10 Stat. 612; 24 Stat. 505; 28 U. S. C. §§ 41 (20), 250 (1). In the light of these statutes it ought not to be assumed that when

[8] The Act of February 24, 1855 (10 Stat. 612), establishing the Court of Claims allowed suit for claims "upon any contract, express or implied . . ." The Act of March 3, 1887 (24 Stat. 505) allowed suits for claims "upon any contract, express or implied . . . or for damages, liquidated or unliquidated, in cases not sounding in tort. . . ." See 28 U. S. C. §§ 41 (20), 250 (1).

Congress consented "to suit" without qualification, the effect is the same as though it had written "in suits on contract, express or implied, in cases not sounding in tort." No such distinction was made by Congress, and no such interpolation into statutes has been made in cases affecting government corporations incorporated under state law or that of the District of Columbia.[9] There is equally no warrant for importing such a distinction here. To do so would make application of a steadily growing policy of governmental liability contingent upon irrelevant procedural factors. These, in our law, are still deeply rooted in historical accidents to which the expanding conceptions of public morality regarding governmental responsibility should not be subordinated.

Congress has embarked upon a generous policy of consent for suits against the government sounding in tort even where there is no element of contract. It has sanctioned suits for patent infringement, 36 Stat. 851, provided for compensation for the disability or death of a government employee "while in the performance of his duty," 39 Stat. 742, authorized payment for damage to property by the Army Air Service. 41 Stat. 109. These and other public statutes and many private bills were founded on considerations thus generalized in a Report of the Senate Committee on Claims:

"In other words, it may be said that Congress has recognized the general liability of the Government within maximum amounts for the negligence of officers and employees of the United States, but the machinery for determining that liability is defective and results in overburdening the Claims Committee of Congress and Congress itself with the consideration of tort liability claims and with injuries to the claimants.

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[9] The cases are collected in Thurston, *Government Proprietary Corporations* (1935) 21 Va. L. Rev. 351, 378, *et seq.*

"This proposed legislation is designed to relieve the situation by utilizing the machinery of the Accounting Office and judicial branches of the Government in the assistance of Congress." Senate Report No. 1699, 70th Cong., 2d Sess., p. 4. See also Senate Report No. 658, 72d Cong., 1st Sess., p. 3.

Acting on these views, Congress passed a general court of claims bill, which, however, at the close of the session failed of enactment by President Coolidge's pocket-veto. H. R. 9285, 70th Cong., 2d Sess.; 70 Cong. Rec. 4836.[10] Congress has thus clearly manifested an attitude which serves as a guide to the scope of liability implicit in the general authority it has conferred on governmental corporations to sue and be sued. We should be denying the recent trend of Congressional policy to relieve Regional from liability. This compels us to reverse the judgment of the court below.

Reversed.

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[10] That objections to the administrative features of the bill were the probable reasons for the veto is indicated by a memorandum of Attorney-General Sargent, for which see McGuire, *Tort Claims against the United States* (1931) 19 Geo. L. J. 133, 134, 135.

TEXAS *v.* FLORIDA ET AL.

No. 11, Original. Argued February 7, 1939.—Decided March 13, 1939.

1. The Court inquires *sua sponte* into its jurisdiction of the case. P. 405.
2. Private parties whose presence is necessary or proper for the determination of a case or controversy between States may be joined as defendants. *Id.*
3. Jurisdiction of this suit under Constitution Art. III, § 2 turns on the questions whether the issue framed by the pleadings constitutes a justiciable "case" or "controversy" and whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law and equity systems which are guides to decision of cases within the original jurisdiction of this Court. *Id.*
4. Bills of interpleader and bills in the nature of interpleader considered. *Id.*
5. The equitable jurisdiction by bill in the nature of interpleader exists where the parties, including the plaintiff, have independent and mutually exclusive claims upon the same fund and where, although in point of law or fact only one claimant is entitled to succeed, there is danger that independent prosecutions of the claims may result in multiple recoveries and resultant depletion of the fund to the damage of the claimant properly entitled. The ground of the jurisdiction is to avoid this danger. Equity avoids it by requiring the rival claimants to litigate before it the decisive issue. P. 406.
6. A suit, by bill in the nature of interpleader, brought by a State against other States to determine the true domicile of a decedent as the basis for death taxes, each State claiming the right to tax the succession to his intangible property upon the ground that he was there domiciled at the time of death,—*held* cognizable in equity and within the original jurisdiction of this Court. Constitution Art. III, § 2. P. 405.

   The sole legal basis asserted by each State for the right to impose the tax was domicile of the decedent, at the time of his death, in the taxing State; by the law of each there could be but one domicile for death tax purposes; each in good faith claimed the domicile and, prior to the suit, was in good faith preparing to enforce a tax lien upon decedent's intangibles and, but for the suit, would be taking steps to that end; the net estate was in-

sufficient to pay the tax claims of all the States and of the Federal Government; none of the States would consent to become a party to any proceeding in any of the others, to determine the right to tax; there was substantial basis for the claim of domicile in each of the States; and, due to the jurisdictional peculiarities of the federal and state judicial systems, and to the special circumstances of the case, there was a real risk that through conflicting assessments aggregating an amount in excess of the estate the right of the complainant or some other State might be defeated; no question was presented of a situs of any of the intangible property differing, for tax purposes, from the place of domicile, and no determination in this suit, as to domicile, could foreclose determination of such questions of other tax situs by any court of competent jurisdiction in which they might arise.

7. That two or more States may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within it, in proceedings binding upon the representatives of the estate, but to which the other States are not parties, is an established principle. P. 410.
8. The equity jurisdiction in a suit in the nature of interpleader being founded on avoidance of the risk of loss resulting from the threatened prosecution of multiple claims, the risk must be appraised in the light of the circumstances as they are in good faith alleged and shown to exist at the time when the suit was brought. P. 410.
9. In a suit like the present between States, mere adjudication suffices and need not be supplemented by an injunction. P. 411.
10. The Court accepts the Special Master's findings of fact and his conclusion that the decedent at the time of his death was domiciled in Massachusetts. P. 413.
11. Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile. P. 424.
12. While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they can not supply the fact of residence there; and they are of slight weight when they conflict with the fact. This is the more so where, as here, the statements are shown to have been inspired by the desire to establish a nominal residence for tax purposes, different from the residence in fact. P. 425.

In such circumstances, the actual fact of the place of residence and the person's real attitude and intention with respect to it as

disclosed by his course of conduct are the controlling factors in ascertaining his domicile. When one intends the facts to which the law attaches consequences, he must abide the consequences whether intended or not.

13. One can not elect to make his home in one place in point of interest and attachment and for the general purposes of life, and in another, where he in fact has no residence, for the purpose of taxation. P. 426.

14. Physical facts of residence, united with major life interests may fix domicile—one's "preëminent headquarters." *Id.*

15. The burden of proof is on one who claims that an earlier domicile was abandoned for a later one. P. 427.

ORIGINAL suit by the State of Texas against the States of Florida, New York and Massachusetts, to determine the domicile, at death, of Edward H. R. Green, deceased, as a basis for right to levy a death tax in respect of the succession to his intangible property. His wife and his sister, claimants upon the estate, were also impleaded as parties defendant. The defendant States separately denied the plaintiff's claim of domicile in Texas, and each by counterclaim asserted its claim of domicile and consequent right to tax. The wife admitted that the decedent's domicile was in Texas and laid claim to a large share of the estate as community property free from death taxes. She was dismissed from the suit, on stipulation. 302 U. S. 662. The sister denied the plaintiff's claim of domicile in Texas and prayed that the true domicile for purposes of taxation be determined. The case was referred to John S. Flannery, Esq., as Special Master, who took voluminous evidence and made his report. He found that the domicile of decedent at the time of his death was in Massachusetts. The case was heard on exceptions to the Special Master's conclusions of fact and subsidiary findings.

Messrs. William McCraw, Attorney General of Texas, and *Llewellyn B. Duke,* First Assistant Attorney General,

with whom *Mr. Wm. Madden Hill,* Assistant Attorney General, was on the brief, for complainant.

Mr. Seth T. Cole, with whom *Messrs. John J. Bennett, Jr.,* Attorney General of New York, *Mortimer M. Kassell,* and *William M. O'Reilly* were on the brief, for the State of New York, defendant.

Messrs. George Couper Gibbs, Attorney General of Florida, and *Edgar G. Hamilton,* with whom *Mr. H. E. Carter,* Assistant Attorney General, was on the brief, for the State of Florida, defendant.

Mr. Edward O. Proctor, Assistant Attorney General, with whom *Messrs. Paul A. Dever,* Attorney General of Massachusetts, *Henry F. Long,* and *T. Ludlow Chrystie* were on the brief, for the Commonwealth of Massachusetts, defendant.

Messrs. Harrison Tweed, Timothy N. Pfeiffer, Walter E. Hope, and *George W. Jaques* submitted for Wilks, defendant.

Mr. Justice Stone delivered the opinion of the Court.

This original suit, in the nature of a bill of interpleader, brought to determine the true domicile of decedent as the basis of rival claims of four states for death taxes upon his estate, raises two principal questions: Whether this Court has jurisdiction of the cause and, if so, whether the report of the Special Master, finding that decedent at the time of his death was domiciled in Massachusetts, should be confirmed.

On March 15, 1937, this Court granted the motion of the State of Texas for leave to file its bill of complaint against the States of Florida and New York and the Commonwealth of Massachusetts, and against decedent's wife, Mabel Harlow Green, and his sister, Hetty Sylvia Ann

Howland Green Wilks, both alleged to be residents of New York. The bill of complaint alleges that Edward H. R. Green died at Lake Placid, New York, on June 8, 1936, leaving surviving him his wife and sister as his only heir and next of kin; that he left a gross estate of approximately $44,348,500, and a net estate valued at $42,348,500, comprising real estate and tangible personal property located in Texas, New York, Florida and Massachusetts, of an aggregate value of approximately $6,500,000, and intangible personal property consisting principally of stocks, bonds and securities, the paper evidences of most of which were located in New York.

The bill of complaint alleges that decedent, at the time of his death, was domiciled in Texas, but that Florida, New York, and Massachusetts each asserts, through its taxing officials, that decedent was at the time of his death domiciled within it. It alleges in detail that Texas and each of the defendant states maintains and enforces a system of taxation upon the inheritance or succession of the estates of decedents domiciled within the state at death, under which laws real estate and tangible personal property located within the state and all intangibles, regardless of their situs, are subjected to the tax; that each of the four states asserts and proposes to exercise the right to tax the estate of decedent on the assumption that decedent was domiciled within it at the time of his death; and that certain judicial proceedings have been instituted in each of the four states for the administration of decedent's estate or some parts of it.[1] It is further alleged that

[1] The allegations are that on July 28, 1936, decedent's wife was appointed temporary administratrix of decedent's estate in Texas on an allegation that Green had died intestate and was domiciled at death in Texas; that on August 1, 1936, a proceeding was begun by decedent's sister in the Surrogate's Court of Essex County, New York, for the probate of decedent's will and for her confirmation as the executrix named in the will, in which proceeding she alleged that

none of the four states and no officer or representative of any state, except as already noted, has become a party to any of those proceedings, and that no state or its officer or representative will appear or become a party to any such proceedings instituted in any other state to fix or assess death taxes on decedent's estate, and that no judgment in any such proceeding will be binding on any state not a party to it; that each of the four states claims a lien for taxes and the right to collect a tax, based on decedent's alleged domicile within it, upon the tangibles located in the state and upon all decedent's intangibles wherever located, the total of such claims amounting to a sum far greater than the net value of the estate; that the amount of decedent's property located in Texas is negligible in amount and insufficient to pay its tax; and in the event that the states should obtain adjudications in their own or other courts in pending proceedings, or others instituted for the purpose of collecting the tax on the ground that decedent was domiciled elsewhere than in Texas, Texas would be deprived of its lawful tax. The bill prays that the Court determine whether decedent's domicile,

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decedent, a non-resident of New York, had died there, leaving personal property located in the state, and in which proceeding a temporary administrator was appointed and decedent's wife and the New York Tax Commissioner entered their appearances; that on August 31, 1936, decedent's wife commenced an action in the United States District Court for northern Texas against decedent's sister to determine the rights of the former in the estate of decedent by reason of an alleged antenuptial agreement which purported to exclude the wife from any interest in decedent's property; that on October 21, 1936, on application of the Massachusetts Commissioner of Corporations and Taxation, a special administrator of the estate of decedent was appointed by a Massachusetts probate court to take possession of and conserve decedent's property in that commonwealth; and that on January 4, 1937, the County Judges' Court of Dade County, Florida, appointed decedent's widow administratrix of the estate of her husband located in Florida.

for purposes of taxation, was in either of the defendant states and that particularly it determine and adjudicate that his domicile was in Texas and that it alone has the right to assess and collect death taxes on decedent's intangibles.

The several defendant states, answering, admit that decedent's estate is insufficient to satisfy the total amount of the taxes claimed. All deny that Green was domiciled in Texas, and by way of counterclaim and cross-bill against the other defendants, each asserts that he was domiciled in it and that it is entitled to collect death taxes upon all of decedent's intangible property and upon all his tangibles within the state. The answer of decedent's wife admitted that he was domiciled in Texas and asserted that by Texas law she owned, as community property, one-half of substantially all of decedent's estate acquired by him after their marriage, free and clear of all death taxes. Pursuant to stipulation showing that she had released all interest in decedent's estate, the suit was dismissed as to her by order of the Court on January 17, 1938. 302 U. S. 662. The answer of defendant Wilks, decedent's sister, denies that Green was domiciled in Texas and asks the Court to determine in which of the defendant states he was domiciled for purposes of taxation.

On June 1, 1937, this Court appointed a Special Master, 301 U. S. 671, to take evidence, to make findings of fact and state conclusions of law, and to submit them to this Court, together with his recommendations for a decree. The Special Master has reported his findings, with certain evidentiary facts, and his finding that decedent at the time of his death was domiciled in the Commonwealth of Massachusetts, this latter conclusion being supported by elaborate subsidiary findings. The case is now before us on exceptions to the Special Master's conclusions of fact and subsidiary findings that decedent's domicile was in Massachusetts at the time of his death.

JURISDICTION.

While the exceptions do not challenge the jurisdiction of the Court, the novel character of the questions presented and the duty which rests upon this Court to see to it that the exercise of its powers be confined within the limits prescribed by the Constitution make it incumbent upon us to inquire of our own motion whether the case is one within its jurisdiction. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 382. By the Judiciary Article of the Constitution, the judicial power extends to controversies between states, and this Court is given original jurisdiction of cases in which a state shall be a party. Art. III, § 2. The present suit is between states, and the other jurisdictional requirements being satisfied, the individual parties whose presence is necessary or proper for the determination of the case or controversy between the states are properly made parties defendant. Cf. *United States* v. *West Virginia,* 295 U. S. 463, 470. So that our constitutional authority to hear the case and grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable "case" or "controversy" within the meaning of the Constitutional provision, and whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court. See *Robinson* v. *Campbell,* 3 Wheat. 212, 222, 223; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 460, 462; *Irvine* v. *Marshall,* 20 How. 558, 564, 565; *Payne* v. *Hook,* 7 Wall. 425, 430.

Before the Constitution was adopted a familiar basis for the exercise of the extraordinary powers of courts of equity was the avoidance of the risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty. *Alnete* v. *Bettam,* Cary, 65 (1560); *Hackett* v. *Webb and Willey,* Finch 257 (1676);

see 9 Viner Abr., 419–440; 1 Spence, The Equitable Jurisdiction of the Court of Chancery, 659; Maclennan, Law of Interpleader, 5 *et seq.* Since, without the interposition of equity, each claimant in pursuing his remedy in an independent suit might succeed and thus subject the debtor or the fund pursued to multiple liability, equity gave a remedy by way of bill of interpleader, upon the prosecution of which it required the rival claimants to litigate in a single suit their ownership of the asserted claim. A plaintiff need not await actual institution of independent suits; it is enough if he shows that conflicting claims are asserted and that the consequent risk of loss is substantial. *Evans* v. *Wright,* 13 W. R. 468; *Michigan Trust Co.* v. *McNamara,* 165 Mich. 200; 130 N. W. 653; *Webster* v. *Hall,* 60 N. H. 7; *Thompson* v. *Ebbets,* Hopk. Ch. 272 (N. Y.); *Dorn* v. *Fox,* 61 N. Y. 264; *Yarborough* v. *Thompson,* 3 Sm. & M. (11 Miss.) 291, 294; 4 Pomeroy, Equity Jurisprudence (4th ed.) §§ 1319–1329, 1458–1482; Maclennan, *supra,* 119.

The peculiarity of the strict bill of interpleader was that the plaintiff asserted no interest in the debt or fund, the amount of which he placed at the disposal of the court and asked that the rival claimants be required to settle in the equity suit the ownership of the claim among themselves. But as the sole ground for equitable relief is the danger of injury because of the risk of multiple suits when the liability is single, *Farley* v. *Blood,* 30 N. H. 354, 361; *Bedell* v. *Hoffman,* 2 Paige 199, 200; *Mohawk & Hudson R. Co.* v. *Clute,* 4 Paige 384, 392; *Atkinson* v. *Manks,* 1 Cowen (N. Y.) 691, 703; Story, Equity Pleadings (10th ed.) §§ 291, 292, and as plaintiffs who are not mere stakeholders may be exposed to that risk, equity extended its jurisdiction to such cases by the bill in the nature of interpleader. The essential of the bill in the nature of interpleader is that it calls upon the court to exercise its jurisdiction to guard against the risks of loss

from the prosecution in independent suits of rival claims where the plaintiff himself claims an interest in the property or fund which is subjected to the risk. The object and ground of the jurisdiction are to guard against the consequent depletion of the fund at the expense of the plaintiff's interest in it and to protect him and the other parties to the suit from the jeopardy resulting from the prosecution of numerous demands, to only one of which the fund is subject. While in point of law or fact only one party is entitled to succeed, there is danger that recovery may be allowed in more than one suit. Equity avoids the danger by requiring the rival claimants to litigate before it the decisive issue, and will not withhold its aid where the plaintiff's interest is either not denied or he does not assert any claim adverse to that of the other parties, other than the single claim, determination of which is decisive of the rights of all. *Pacific National Bank* v. *Mixter,* 124 U. S. 721; *Providence Sav. Life Assur. Soc.* v. *Loeb,* 115 F. 357; *Sherman National Bank* v. *Shubert Theatrical Co.,* 238 F. 225, aff'd, 247 F. 256; *Illingworth* v. *Rowe,* 52 N. J. Eq. 360; 28 A. 456; *Carter* v. *Cryer,* 68 N. J. Eq. 24; 59 A. 233; 2 Story, Equity Jurisprudence (14th ed.) § 1140; Story, Equity Pleadings (10th ed.) § 297b; Chafee, Cases on Equitable Remedies, 75 *et seq.;* 3 Daniell, Chancery Pleading and Practice (6th Amer. Ed.) 1572; Maclennan, *supra,* 338 *et seq.*

When, by appropriate procedure, a court possessing equity powers is in such circumstances asked to prevent the loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims, a justiciable issue is presented for adjudication which, because it is a recognized subject of the equity procedure which we have inherited from England, is a "case" or "controversy," within the meaning of the Constitutional provision; and when the case is one prosecuted between states, which are the rival claimants, and the risk of loss

is shcwn to be real and substantial, the case is within the original jurisdiction of this Court conferred by the Judiciary Article. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 261 *et seq.,* and cases cited.

Here it is conceded by the pleadings and upon brief and argument that the sole legal basis asserted by the four states for the imposition of death taxes on decedent's intangibles is his domicile at death in the taxing state. There is no question presented of a situs of decedent's intangibles differing, for tax purposes, from the place of his domicile, such as was considered in *New Orleans* v. *Stempel,* 175 U. S. 309; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 8; *First National Bank* v. *Maine,* 284 U. S. 312, 331; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 210; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 237, 238; *Long* v. *Stokes,* 174 Tenn. 1; 118 S. W. 2d 228, probable jurisdiction noted, Nov. 14, 1938; *Graves* v. *Elliott,* 274 N. Y. 10; 8 N. E. 2d 42, certiorari granted November 14, 1938, 305 U. S. 667. And no determination made here as to domicile can hereafter foreclose the determination of such questions by any court of competent jurisdiction in which they may arise. By the law of each state a decedent can have only a single domicile for purposes of death taxes, and determination of the place of domicile of decedent will determine which of the four states is entitled to impose the tax on intangibles so far as they have no situs different from the place of domicile. No relief is sought to restrain collection of the tax or to interfere with the determination of its amount by appropriate state procedure.

The Special Master has found that each of the four states in good faith asserts that the decedent was domiciled within it at his death; that prior to the commencement of these proceedings each state in good faith was preparing to enforce a lien on decedent's intangibles

wherever located and would now be taking appropriate action but for these proceedings; and that the net estate is not sufficient to pay the aggregate amount of the taxes claimed by them and by the federal government.[2] He has

[2] The Special Master has found as follows: The net estate, after payment of debts and administration expenses other than death taxes, will amount to $36,137,335; and the tangible property taxable in the state of its situs is as follows:

Texas	$2,220.00
Florida	222,276.00
New York	1,583,221.00
Massachusetts	2,498,707.00

Decedent's intangibles at the time of his death had a value of $35,831,303. The paper evidences of decedent's intangibles were located outside of the states of Texas, Florida, and Massachusetts. "The aggregate value of the shares of stock in and obligations of corporations and associations organized or having a principal place of business in Texas, Massachusetts and Florida, respectively, and of the obligations of persons residing in said States and of the obligations of said States and political subdivisions thereof, together with the value of the real estate and tangible property in Texas, Massachusetts and Florida, respectively, is less than the amount of the tax claimed by each of said States and the amount of such tax claimed by Texas, Massachusetts and Florida, respectively, greatly exceeds the value of the property subject to the jurisdiction of their respective Courts and from which the tax might be collected in any proceeding in said Courts." The Special Master found that the death taxes due to the United States, and due to each state, if its contentions be sustained, are as follows:

United States	$17,520,987
Texas	4,685,057
Florida	4,663,857
New York	5,910,301
Massachusetts	4,947,008
Total	$37,727,213

This exceeds the total net estate by the sum of $1,589,877. In addition the State of New York asserts a claim for unpaid personal income taxes of $920,827.

also found, as averred in the pleadings, that none of the four states has become or will consent to become a party to any proceedings for determining the right to collect the tax in any other state; that the right of Texas to assert its tax lien and to prosecute its claim for taxes with success is in jeopardy and that it is without adequate remedy save in this Court.

The risk that decedent's estate might constitutionally be subjected to conflicting tax assessments in excess of its total value and that the right of complainant or some other state to collect the tax might thus be defeated was a real one, due both to the jurisdictional peculiarities of our dual federal and state judicial systems and to the special circumstances of this case. That two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within it in proceedings binding upon the representatives of the estate, but to which the other states are not parties, is an established principle of our federal jurisprudence. *Thormann* v. *Frame,* 176 U. S. 350; *Overby* v. *Gordon,* 177 U. S. 214; *Burbank* v. *Ernst,* 232 U. S. 162; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394; *Iowa* v. *Slimmer,* 248 U. S. 115, 120, 121; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 299. And a judgment thus obtained is binding on the parties to it and constitutionally entitled to full faith and credit in the courts of every other state. *Milwaukee County* v. *White Co.,* 296 U. S. 268. The equity jurisdiction being founded on avoidance of the risk of loss resulting from the threatened prosecution of multiple claims, the risk must be appraised in the light of the circumstances as they are in good faith alleged and shown to exist at the time when the suit was brought. Cf. *Clark* v. *Wooster,* 119 U. S. 322; *Rice & Adams Corp.* v. *Lathrop,* 278 U. S. 509; Maclennan, *supra,* 132 *et seq.* In this case, as will presently be noted, the relations of decedent to each of the

demanding states were such as to afford substantial basis for the claim that he was domiciled within it, with fair probability that the claim would be accepted and favorably acted upon if there were no participation by the other states in the litigation. See *New Jersey* v. *Pennsylvania,* 287 U. S. 580; *Hill* v. *Martin,* 296 U. S. 393; *Dorrance's Estate,* 309 Pa. 151; 163 A. 303, certiorari denied, 287 U. S. 660, 288 U. S. 617; *In re Dorrance,* 115 N. J. Eq. 268; 170 A. 601; *Dorrance* v. *Martin,* 116 N. J. Law 362; 184 A. 743, certiorari denied, 298 U. S. 678. Cf. *Matter of Trowbridge,* 266 N. Y. 283; 194 N. E. 756. In addition the facts most essential to establishing that attitude and relationship of person to place which constitute domicile were in this case obscured by numerous self-serving statements of decedent as to his domicile, which, because made for the purpose of avoiding liability for state income and personal property taxes levied on the basis of domicile, tended to conceal rather than reveal the true relationship in this case. Taken as a whole the case is exceptional in its circumstances and in the principles of law applicable to them, all uniting to impose a risk of loss upon the state lawfully entitled to collect the tax.

We think that the Special Master's finding of jeopardy is sustained; that a justiciable "case" between the states is presented; and that a cause of action cognizable in equity is alleged and proved. The fact that no relief by way of injunction is sought or is recommended by the Special Master does not militate against this conclusion. While in most causes in equity the principal relief sought is that afforded by injunction, there are others in which the irreparable injury which is the indispensable basis for the exercise of equity powers is prevented by a mere adjudication of rights which is binding on the parties. This has long been the settled practice of this Court in cases of boundary disputes between states. *Louisiana* v. *Mis-*

sissippi, 202 U. S. 1; *Arkansas* v. *Tennessee,* 246 U. S. 158; *Georgia* v. *South Carolina,* 257 U. S. 516; *Oklahoma* v. *Texas,* 272 U. S. 21; *Michigan* v. *Wisconsin,* 272 U. S. 398; *New Jersey* v. *Delaware,* 291 U. S. 361. In the case of bills of peace, bills of interpleader and bills in the nature of interpleader, the gist of the relief sought is the avoidance of the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing. These risks are avoided by adjudication in a single litigation binding on the parties.

While courts of equity in such suits may and frequently do give incidental relief by injunction to secure the full benefits of the adjudication and to terminate the litigation in a single suit, they are not bound to do so and their adjudication of the conflicting claims is not any the less effective as res judicata because not supplemented by injunction. We do not doubt that when the equity powers of the Court have been invoked it has power in its discretion to give such incidental relief by way of injunction as will make its determination the effective means of avoiding risk of loss to any of the parties by reason of the asserted multiple tax liability. But the plenary effect of its decision as res judicata, and considerations of convenience in the levying of the tax by the usual state procedure, make it unnecessary and undesirable that the Court should proceed beyond adjudication. The fact that the Court, for reasons of policy or convenience, does not exercise the power which it possesses and which has been traditionally exercised in like cases between private suitors does not deprive the suit of its character as a case or controversy cognizable by the Court in an original suit. See *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123, 132, 133, 134; *Nashville, C. & St. L. Ry.* v. *Wallace, supra.*

DOMICILE.

The Special Master took voluminous testimony in each of the four states, recording every available fact having any bearing on the issue of decedent's domicile. After an exhaustive study of the evidence the Special Master has prepared elaborate subsidiary findings in which he has stated what he considers to be the essential facts of decedent's life which, taken together, were the controlling factors in his arriving at the conclusion that decedent, at the time of his death, was domiciled in the Commonwealth of Massachusetts.

In considering and weighing the evidence the Special Master concluded that there was no local law peculiar to any of the states with respect to the essential fact elements which go to establish domicile, and that the rule in each of the states defining domicile was substantially that of the common law. Texas, since Green in the earlier part of his life lived for a large part of his time in that state and frequently proclaimed it to be his legal residence, places great emphasis on the common law rule that when one has once acquired a domicile in one place he does not lose it by mere residence elsewhere without the intention to make the new place of residence a domicile in the sense of a permanent home. The defendant states, as they were all places in which decedent lived for considerable periods of time during the latter part of his life, and as they were all places with which he then became more intimately associated, place greater emphasis on "home" as the substantial equivalent of domicile as the term is defined in the American Law Institute's Restatement of Conflict of Laws, § 13, where it is said: "A home is a dwelling place of a person, distinguished from other dwelling-places of that person by the intimacy of the relation between the person and the place . . . In

determining whether a dwelling-place is a person's home, consideration should be given to:

"1. Its physical characteristics;

"2. The time he spends therein;

"3. The things he does therein;

"4. The persons and things therein;

"5. His mental attitude towards the place;

"6. His intention when absent to return to the place;

"7. Elements of other dwelling-places of the person concerned."

The Special Master, while not completely adopting either of the tests proposed, nevertheless finds that both support his conclusion. We accept the Special Master's findings of fact and his conclusion that the decedent at the time of his death was domiciled in Massachusetts. As the Master has found and stated in great detail the circumstances of decedent's life which lead to that conclusion, and has made them available in his report, we find it unnecessary to do more than state the salient facts which are typical of and supported by many others, and which support his ultimate conclusion.

Edward Green was born in England August 22, 1868, and was in his sixty-eighth year at the time of his death, June 8, 1936, at Lake Placid, New York, where he was temporarily sojourning for reasons of health. He was the son of Hetty Green, a well-known figure in the financial world, who was born in New Bedford, Massachusetts. Her forebears had resided in that vicinity since the seventeenth century, and Green and his sister Mrs. Wilks inherited from her one hundred and thirty acres of land in the town of Dartmouth, which had been the family home and had been property of the family for some two hundred years. The foundation of the family fortune had been laid in the whaling industry, centering at New Bedford. At her death his mother left an estate of $67,000,000

which, under her will, became the property of decedent and his sister in substantially equal shares.

His education was in the public schools of Vermont and New York, and for two years he attended Fordham University in New York City. His tastes were not artistic or literary; he had a deep interest in scientific study and experimentation, especially in the fields of astronomy, geology, electricity, photography, radio and aviation. He was fond of the sea and of yachting, and until a serious illness in 1921, followed by permanent impairment of his health, he was interested in athletics and outdoor life. After that time he became especially interested in collecting stamps, coins, currency, and jewels, to which he devoted much attention. He had no interest in fashionable or social life, but preferred, as he stated, associating with the common man or "the man in the street."

In 1892, when he was twenty-four years old, his mother sent him to Texas to foreclose a mortgage on a short line of railroad located there, later known as the Texas Midland Railroad. As the result of the foreclosure she acquired the railroad, and for the larger part of Green's time until 1911 he remained in Texas for the purpose of looking after the management of the road. In that year he returned to live in New York at the urgent request of his mother, who, because of failing health, desired his assistance in the management of her business affairs.

From 1911 until 1921 Green customarily made two trips a year to Texas, one to attend the annual meeting of the railroad and the other to inspect the road, and in alternate years to vote in Terrell, Texas, in state and municipal elections. From 1922 to 1927 he made but one annual visit, in the spring of each year. After 1923 he spent only two or three days on each visit to Texas, in Terrell and its vicinity. In the years 1924 to 1927 he visited Marlin, Texas, where he remained for about a month each

year for purposes of medical treatment. In 1928 the railroad was sold. After the agreement for sale was made in 1927, he made no other visit to Dallas or Terrell, and his only visit to Texas was in 1935, for treatment at a clinic in Marlin.

During the period of his residence in Texas, decedent was a bachelor and maintained domestic establishments at various places. He at first lived in a hotel. About 1894 he maintained a bachelor apartment at Terrell. For a time he also kept rooms at a hotel in Dallas and then about 1896 or 1897 leased an apartment in that city. Later he purchased a building there which he remodelled and occupied as a dwelling until 1911, when the building was sold. After that he caused a friend to rent a room for him in Terrell, Texas, admittedly for the purpose of preserving his right to vote in Texas. The room was never occupied by him nor were any of his possessions sent there, except a box containing a pair of trousers and a vest. He also owned a two hundred acre experimental farm near Terrell where there were living quarters which he occasionally used. The farm was afterwards sold, and from 1911 on he had no dwelling place in Texas except his private railroad car, which was sold with the road in 1927–1928. Upon his removal to New York in 1911 all of the best furniture in the Dallas residence was packed and shipped to New York for use in his dwelling there. His library of books on scientific subjects was given to the Dallas Public Library. At the time of his death his only real property in Texas consisted of some unsaleable lots pertaining to the railroad which were appraised at $2,200.

During the period of his residence in Texas, aside from his active interest in the management of the railroad he became interested in scientific and farm experimentation. He also became active in Texas politics, was a Texas delegate to the Republican National Convention at St. Louis, and became Chairman of the Republican State Executive

Committee, serving in that capacity for four years, and upon reëlection until 1900. In 1906 the nomination for Governor of Texas on the Republican ticket was offered him, but he declined the nomination upon the insistence of his mother. He was appointed a colonel upon the Texas Governor's Staff and served in that capacity until January, 1915. Prior to 1911 and until 1920 he voted in Texas in state and national elections.

Green frequently expressed himself as being attached to the state and to its people. With few exceptions and in substantially all deeds, papers, and legal documents he described himself as of Terrell, Texas, and instructed his secretary and office manager and his attorneys in New York, Massachusetts, and Florida, to mention in all important legal documents that Terrell was his legal residence. He continued this practice until 1935. In his will, executed in 1908, in his application for a marriage license in 1917, and in the probate proceedings connected with his mother's estate, 1916–1918, he was described as of Terrell, Texas. In 1922 he declined to consider running for Congress in Massachusetts because he claimed to be a resident of Texas. In 1929 he stated he would not be available for appointment as Federal Radio Commissioner from New England because he was a former Republican National Committeeman of Texas and spent only the summer months in New England. In 1935 he testified under oath in Florida that his residence was Texas, with a winter home in Florida and a summer home in New Bedford. In that year he returned to the Texas Centennial Committee a certificate which described him as of Massachusetts, with the statement: "I have never changed my legal residence from Terrell, Texas."

If declarations were alone sufficient to establish domicile, the record would leave no doubt that Green was domiciled in Texas until the time of his death. But in this connection it should be noted that Green never paid

an income tax or a personal property tax on intangibles in any state, and the Special Master was of opinion that the desire to avoid taxation was a controlling motive for Green's repeated declarations that he was a resident of Texas long after he had ceased to have an abiding place or any active connection with affairs in that state.

In July, 1911, Green removed his household belongings to New York City, where he established his dwelling place in a house at 5 West 90th Street, which was owned by the estate of his grandfather and adjoined a house occupied by his mother. He opened an office in New York City, which remained his business headquarters until his death, and with his mother maintained a joint office in her residence. When Green came to New York his mother settled upon him, as his own, property valued at $500,000. Upon her death in 1916 he became entitled to an interest in the estate of his grandfather aggregating $4,500,000, and under the will of his mother he became entitled to the income of one-half of her estate for a period of ten years, when he received one-half of the principal, aggregating about $33,000,000.

Following his mother's death he was married, on July 10, 1917, to Miss Mabel Harlow. The following winter they removed from the 90th Street house to an apartment in the Waldorf Hotel, where they lived when in New York until the hotel was demolished in 1921. Then they removed to the Sherry Netherlands Hotel, where they rented and used a large suite. He at first took a two year lease on the apartment, but from May 1, 1931, the rental was continued on a monthly basis. The apartments were furnished by the hotels; decedent's furniture, pictures, and personal belongings, much of which he had brought from Texas, remained at 5 West 90th Street until 1921, when most of them were removed to decedent's place at Round Hills, Massachusetts. In 1928 the remainder was sent to Round Hills and the New York house demolished.

During the last ten years of his life his apartment in New York was used only as a temporary stopping place on his trips north and south. At his death the family belongings in the apartment consisted of some of his mother's letters, a portion of his stamp collection, his interest in which had been slight since 1927, some clothing of Mrs. Green's, and a few personal belongings worth less than $1,000. His tangible personal property in New York at the time of his death consisted principally of his collection of jewels, coins, currency and stamps, having an aggregate value of $1,583,221.

Green never registered or attempted to vote in New York. In 1916 he was assessed there for personal property taxes, but the assessment was cancelled upon his submission of affidavits declaring that his legal residence was in Texas. To the suggestion of a friend made in 1917 that he build a home on Long Island, he replied that he did not want to do so as he did not wish to pay taxes in New York. And later he stated that he desired to build on his mother's place at Round Hills in Massachusetts. During the period from 1911 to 1921 he was active in business affairs in New York. He managed his own fortune, which amounted to approximately $6,000,000 after his mother's death. He also assisted in managing her extensive business interests and after her death was actively engaged as executor and trustee in looking after her large estate, including several family-owned holding corporations. Decedent became a director of a New York National Bank and a director of two important trust companies and regularly attended their meetings and participated in their affairs until about 1921. He maintained large deposit balances in New York banks; his personal securities were kept in safe deposit vaults there. He did not enjoy New York life and sometimes expressed dislike of its people and business practices. After his illness in November, 1921, all of his activities there ceased.

He never thereafter attended trustees' or directors' meetings, or went to his New York office.

After his marriage in 1917 Green spent a part of the summer near Round Hills, Massachusetts, in the vicinity of Dartmouth, which was the property he had inherited from his mother. On his first visit on a yachting trip in 1917 he determined to develop the property into a large country estate and build there an imposing residence. With that in view and with the consent and approval of his sister he began to develop the property in the fall of that year by clearing the land, constructing breakwaters, wharves, water tanks, pumping plant, greenhouses and workmen's cottages. From then until 1921 development of the property was his principal interest and occupation. While the work was going forward decedent spent much time on his yacht or at a hotel in the vicinity. In July of 1921 the house was ready for occupancy, and from then until shortly before his death he spent more time there almost every year than at any other place, usually coming to Round Hills immediately after July 1st, evidently because taxes were assessed as of that date, and remaining just short of six months each year.

Between 1917 and 1926 Green expended on the Round Hills estate in excess of $6,688,000. To the land inherited from his mother he added by purchase one hundred and forty adjoining acres. The house was large and imposing—indeed, somewhat "institutional" in appearance, there having apparently been some thought, which he never carried out, of converting it into an institution as a memorial to the Green and Howland families after his own and his sister's death. Upon the property were some sixty structures, including the usual outbuildings of a large country estate, swimming pools, tennis courts, radio broadcasting stations, an airport, airship hangar and dock. The house was designed as a commodious residence, with

carefully planned accommodations for family, guests, and for a full complement of servants.

Special furniture was designed for the house, but furnishings from 5 West 90th Street in New York were also brought to it, including family possessions and heirlooms, two oil portraits of his mother, another of his grandfather, personal collections of prints and engravings of whaling ships and scenes, and framed certificates of his membership in various historical societies. Green assembled there a well chosen library of miscellaneous and scientific books, including many rare volumes on the history of New England and accounts of the whaling industry, on which the family fortune had been founded. In a vault in the basement was assembled a substantial part of his collection of jewelry, coins, and stamps.

In the social life of the countryside he took no part, but he associated freely with employees and tradesmen and visitors interested in scientific research. He developed on a large scale his interest in various scientific activities, especially photography, radio, and aviation. A number of his buildings and radio facilities were placed at the disposal of the Massachusetts Institute of Technology for experimental purposes, and he contributed his own funds to the cost of experiments. On his property he established an airport and a school for aviators. He arranged to have the "Charles W. Morgan," an old whaling ship, transferred to Whaling Enshrined, Inc., to which he gave a strip of the shore at Round Hills where he established the vessel and maintained it as a museum which he kept open to the public. His grounds and bathing beach were also opened to the public, members of which visited them in large numbers.

Owing to his failing health most of these activities, though not his interest in them, were curtailed during the last three years of his life, but he continued to spend most

of the summer and the early fall at Round Hills until the year of his death, and all of his personal and intimate belongings remained there. He told a friend that he hoped to be there when he died; and his remains were brought there from Lake Placid for the funeral service. Green never voted in Massachusetts or openly acknowledged Round Hills as his legal residence, invariably giving as his reason that he wished to avoid paying taxes there. When a demand was made upon him by Massachusetts officials for payment of income tax in 1928, he declined to file a return on the ground that his legal residence was Terrell, Texas. No income or personal property tax on intangibles was paid by him in Massachusetts.

In 1923 he was advised by his physician, following an operation and illness, to go to Florida. He spent the following winter there in hotels or upon boats in the vicinity of Miami and Jacksonville. In April, 1924, he bought land on Star Island, near Miami Beach, and began landscaping work and construction of a dock. In January, 1925, he returned to Miami Beach, living on a houseboat near Star Island for about three and a half months. While there he purchased additional lots and began the construction of a dwelling.

Part of the following winter was spent on his houseboat near Star Island, and the house was finally completed and occupied as a winter residence in 1927. In the following years, until his death, he spent about four and a half months each winter at Star Island, between January and May. The house, costing over $600,000, was fully equipped as a winter residence, with ample accommodations for family, guests, and servants. His total expenditures there amounted to about $1,500,000. The house was furnished with new specially made furniture, and it contained, with negligible exceptions, no pictures, books, furniture, or mementos of intimate personal or family association. As in his other places of residence, he took

little part in the social life of the community. In Florida he never carried on any of the activities or experiments with which he had occupied himself in Texas or Massachusetts. His life in Florida was typical, on the whole, of a semi-invalid seeking health there during the winter months. He busied himself for the most part with automobile rides, cruising in nearby waters, and in working on his collections, parts of which he had brought with him from Massachusetts.

Green occasionally spoke to friends of Florida as his home, saying to one: "This is my home and I expect to live here the rest of my days." He never voted in Florida or paid intangible property taxes there, although subject to such taxes if a resident; in 1933 he declared to the local tax assessor that his legal residence was in another state. In 1931 and again in 1933 he was advised by a friend to change his legal residence from Texas to Florida because of pending tax legislation in Texas. His attorney suggested that as he had a residence in Florida it would only be necessary to make announcement of his intention. But he took no such action and in March of 1935 testified in a judicial proceeding in Florida that Texas was his legal residence.

The four persons nearest to decedent in life, his wife, his sister, his office manager, and his secretary, were able to throw little light on his purposes and intention with respect to his domicile. Mrs. Green, who was a party to the present suit, asserted by her answer that Texas was the domicile of herself and her husband. After settlement with Mrs. Wilks, the sister, of her claims upon the estate, the suit was discontinued as to Mrs. Green. There is nothing in the record to indicate that she has since claimed or resumed her domicile in Texas. On the contrary, she remained at Round Hills for six months after Green's death. The Special Master concluded that her position with reference to her husband's domicile was in-

fluenced by the advantages which might accrue to her from the community property laws of Texas. The sister, by her answer in this case as well as in the New York proceeding where she claimed under her brother's will, in which he declared Texas to be his legal residence, denied that her brother was a resident of Texas, and in this proceeding she asserts that his domicile at the time of his death was in Massachusetts. Neither his wife nor his sister has given any evidence to explain the inconsistency between Green's declarations and his actions or the conflict between themselves upon the issue of domicile. All decedent's books and papers were made available by his office manager, who testified that from the inception of their business association in New York until decedent's death, he claimed Texas as his legal residence and gave instructions that in all formal documents his permanent residence be stated as Texas. His secretary testified to the same effect. Neither was able to give any intimation of the real intention behind decedent's declarations and actions except what may be inferred from his evident desire and frequently announced purpose to escape or minimize taxes.

Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile. *Mitchell* v. *United States,* 21 Wall. 350; *Pannill* v. *Roanoke Times Co.,* 252 F. 910; *Beekman* v. *Beekman,* 53 Fla. 858; 43 So. 923; *Babcock* v. *Slater,* 212 Mass. 434; 99 N. E. 173; *Matter of Newcomb,* 192 N. Y. 238; 84 N. E. 950; Beale, Conflict of Laws, § 15.2. We conclude, as the Special Master found, that Green ceased to have a place of residence in Texas after 1911. About 1914 he gave up his nominal place of abode in the room which he had rented in Terrell, Texas, and which in fact he had never occupied. After that he was never identified in fact with any place of residence in Texas, and there was

nothing in his life to connect him with a Texas home other than his frequent statements that his legal residence was in Texas. While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there; *Matter of Newcomb, supra,* 250; *Matter of Trowbridge,* 266 N. Y. 283, 292; 194 N. E. 756; and they are of slight weight when they conflict with the fact. *Feehan* v. *Tax Comm'r,* 237 Mass. 169, 171; 129 N. E. 292; *Dorrance's Estate,* 309 Pa. 151; 163 A. 303. This is the more so where, as here, decedent's declarations are shown to have been inspired by the desire to establish a nominal residence for tax purposes, different from his actual residence in fact. *Thayer* v. *Boston,* 124 Mass. 132; *Feehan* v. *Tax Comm'r, supra; Matter of Trowbridge, supra;* Beale, *supra,* § 41C. In such circumstances the actual fact as to the place of residence and decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct are the controlling factors in ascertaining his domicile. *Thayer* v. *Boston, supra.* When one intends the facts to which the law attaches consequences, he must abide the consequences whether intended or not. *National City Bank* v. *Hotchkiss,* 231 U. S. 50, 56; *Dickinson* v. *Brookline,* 181 Mass. 195, 196; 63 N. E. 331.

Whatever floating intention Green may have had after 1911 to return to Texas and to make his home there, it is plain that it receded into the background after his mother's death and had completely vanished when he began to build up his extensive estate at Round Hills in Massachusetts. When he had established himself there all the circumstances of his life indicated that his real attitude and intention with respect to his residence there were to make it his principal home or abiding place to the exclusion of others. This is clearly indicated by the fact

that it was the place most associated with his family history, by the scale on which he built, by his assembling there the furnishings and objects closely associated with his earlier homes and with his family life, and by centering there all the activities related to his chief interests—his mechanical and scientific experiments, his development of radio and aviation, and his efforts to preserve records and mementos of the whaling industry with which his mother's family had been associated. He spent more time there than at any other place, evidently curtailing his stays only to avoid the possible danger of being subjected to Massachusetts taxation. His conception of legal residence or domicile as a mental state whereby he could obtain certain political advantages and freedom from taxation does not weigh against this conclusion. He could not elect to make his home in one place in point of interest and attachment and for the general purposes of life, and in another, where he in fact had no residence, for the purpose of taxation. *Feehan* v. *Tax Comm'r, supra,* 171; 129 N. E. 292; *Matter of Trowbridge, supra.*

There is little to support the contention that Green ever intended to make his permanent home in New York. The exigencies of caring for his mother and her property and of managing her estate after her death demanded his presence there. But apart from these demands life there gave him no opportunity to gratify his special tastes and interests. The nearest semblance to a home there, 5 West 90th Street, was abandoned when he removed its furnishings to Round Hills. After that New York saw little of him, and there was little in his life to suggest that he treated it or in his own mind regarded it as his real home or abiding place. Whatever his purpose may have been before that time, after the occupancy of the Round Hills residence the physical facts of residence united with the major interests of his life to fix upon that as his place

of domicile. *Gilbert* v. *David,* 235 U. S. 561, 570. In point of fact and purpose it became his "preëminent headquarters," which is the essence of technical domicile. *Williamson* v. *Osenton,* 232 U. S. 619, 625.

The retention of his apartment at the Sherry Netherlands Hotel in New York, upon temporary lease, and his occupation of it during the later years of his life for short stays when passing through New York on his way to and from Florida, are without weight to turn the scales against the preponderating evidence that his real home was in Massachusetts. From 1921 on the New York apartment furnished none of the physical aspects of a home, and evidence is wanting that the deceased ever regarded or treated it as such.

Proof is wanting also that the domicile established in Massachusetts was abandoned in favor of the Florida house which he built there in 1927. Florida argues the superior attractiveness and merits of that state for purposes of a home over the more austere environment of Round Hills, but there is little in the record to suggest that such an appeal was persuasive to decedent or that Round Hills had ceased to be what it became when he established himself there—first in his interest and attachment. In such circumstances Florida carries the burden of showing that the earlier domicile was abandoned in favor of a later one. *Mitchell* v. *United States, supra,* 352; *Anderson* v. *Watt,* 138 U. S. 694, 706; *Matter of Newcomb, supra,* 250; Beale, *supra,* § 41A. That burden is not sustained by showing a period of winter residence there in obedience to the demands of health, in the absence there of the activities associated with decedent's chief interests and of the objects of those interests and of intimate family association, with which he had surrounded himself at Round Hills.

The report of the Special Master is confirmed. The substance of the Special Master's recommendation for a

decree will be adopted and the parties may submit a proposed form of decree.

So Ordered.

Opinion of MR. JUSTICE FRANKFURTER.

The authority which the Constitution has committed to this Court over "Controversies between two or more States," serves important ends in the working of our federalism. But there are practical limits to the efficacy of the adjudicatory process in the adjustment of interstate controversies. The limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors—often denature and even mutilate the actualities of a problem and thereby render the litigious process unsuited for its solution. Considerations such as these have from time to time led this Court or some of its most distinguished members either to deprecate resort to this Court by states for settlement of their controversies (see *New York* v. *New Jersey,* 256 U. S. 296, 313), or to oppose assumption of jurisdiction (see Mr. Chief Justice Taney in *Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518, 579, 592, in connection with the Act of August 31, 1852 (10 Stat. 112), and *Pennsylvania* v. *Wheeling Bridge Co.,* 18 How. 421; Mr. Justice Brandeis in *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 605).[1]

The presupposition of jurisdiction in this case is the common law doctrine of a single domiciliary status. That

[1] The spirit in which interstate litigation should be approached has been thus expressed by Mr. Chief Justice Fuller in *Louisiana* v. *Texas,* 176 U. S. 1, 15: "But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable."

for purposes of legal rights and liabilities a person must have one domicile, and can have only one, is an historic rule of the common law and justified by much good sense. Nevertheless, it often represents a fiction. Certainly in many situations the determination of a man's domicile is by no means the establishment of an event or a fact that exists in nature. Even assuming that there is general agreement as to the elements which in combination constitute domicile, a slight shift of emphasis in applying the formula produces contradictory results. But, on the whole, the doctrine of domicile has adequately served as a practical working rule in the simpler societies out of which it arose. More particularly, its difficulties of application were circumscribed when wealth predominantly consisted of realty and tangibles, and when restricted modes of transportation and communication conditioned fixity of residence. In view of the enormous extent to which intangibles now constitute wealth, and the increasing mobility of men, particularly men of substance, the necessity of a single headquarters for all legal purposes, particularly for purposes of taxation, tends to be a less and less useful fiction. In the setting of modern circumstances, the inflexible doctrine of domicile—one man, one home—is in danger of becoming a social anachronism. Recent applications and modifications of this rule to satisfy the vague contours of the due process clause have hardly mitigated its inadequacies for our day. *E. g., Frick* v. *Pennsylvania,* 268 U. S. 473; *Blodgett* v. *Silberman,* 277 U. S. 1; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *First National Bank* v. *Maine,* 284 U. S. 312.

The facts in this case doubtless present a bizarre story. But in Green's peregrinations from state to state, in the multiplicity of his residences, and in the conflicting appeals which various states made upon his interests from

time to time, the case is hardly unique nor are analogues to it unlikely to appear in the future. As a result, this Court is asked to determine the conflicting claims of different states of the Union to a share of the estate of individuals who, as a matter of hard fact, at different periods and contemporaneously invoked and enjoyed such benefits as the existence of state governments confer. It is asked to do so by applying an old doctrine of limited validity to modern circumstances whereby, through the elusive search for an often non-existent fact called domicile, only one state to the exclusion of all others would be allowed to levy a tax. The inherent difficulties of this problem have been widely recognized.[2] The old formulas are simply inadequate to the new situation. On the other hand, it is not for this Court in these cases of multiple residences to evolve new taxing policies based on more equitable considerations than the all-or-nothing consequence of the old domiciliary rule.

I am not unaware of the dilemma presented by such a situation as the Dorrance litigation.[3] The circumstances attending the Green estate do not preclude like possibilities. But merely because no other means than litigation have as yet been evolved to adjust the conflicting

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[2] INTERSTATE COMMISSION ON CONFLICTING TAXATION, CONFLICTING TAXATION (1935) 88 *et seq.;* compare League of Nations Documents, E. F. S. 16 A. 16. 1921; E. F. S. 73 F. 19. 1923; C. 368. M. 115. 1925. II; C. 216. M. 85. 1927. II; C. 345. M. 102. 1928. II; C. 562. M. 178. 1928. II; C. 345. M. 134. 1929. II; C. 585. M. 263. 1930. II; C. 791. M. 385. 1931. IIA; C. 618. M. 291. 1933. IIA; C. 118. M. 57. 1936. IIA.

[3] *In re Dorrance's Estate,* 309 Pa. 151, 163 Atl. 303, cert. denied, *sub nom., Dorrance* v. *Pennsylvania,* 287 U. S. 660, 288 U. S. 617; *New Jersey* v. *Pennsylvania,* 287 U. S. 580; *In re Dorrance,* 113 N. J. Eq. 266, 166 Atl. 177; 115 N. J. Eq. 268, 170 Atl. 601; 116 N. J. Eq. 204, 172 Atl. 503, aff'd *sub nom., Dorrance* v. *Martin,* 13 N. J. Misc. 168, 176 Atl. 902, aff'd, 116 N. J. L. 362, 184 Atl. 743, cert. denied, 298 U. S. 678; *Hill* v. *Martin,* 296 U. S. 393.

claims of several states in a single estate is not sufficient reason for utilizing as a basis of our jurisdiction oversimplified formulas of the past that have largely lost their relevance in the contemporary context.

The controlling assumption in taking jurisdiction in this case is that the ascertainment of a single domicile for Green is merely the determination of a fact. The auxiliary assumption is the existence of solid danger that the highest courts of four states will ascertain this fact in four different ways. Texas has no standing here except on the basis that three state courts will despoil her of her rights by leaving no assets in the estate out of which to satisfy her claim. But the fact that the political officers of four states make claims to an estate so as to safeguard any possible interest, is hardly a substantial reason for assuming that their judiciaries will sanction the claims.

It is not to be assumed that the state courts will make findings dictated solely by fiscal advantages to their states. The contrary assumption must be made—and the assumption rests on adjudicated experience, e. g., *Matter of Trowbridge,* 266 N. Y. 283; 194 N. E. 756. To the extent that there is danger that out of the same events four state courts will spell four different domiciles, it is inherent in the search for a domiciliary status. The result is arrived at not through ascertainment of an external fact but by attributions made as a matter of law to satisfy the supposed abstract legal requirement of a single domicile no matter what the actualities of human behavior may be. Even a small change of portions in the admixture of factors which in combination yield the legal concept of domicile, may place the domicile in one state rather than another and, thereby, give estate duties to this state rather than that. But the state treasuries are not alone under powerful motives to exploit the doctrine of domicile. The tax systems of different states have varying degrees of attraction for those in control of an estate, and it is to

their natural interest to seek a single, inclusive disposition of the elusive issue of domicile by having the original jurisdiction of this Court invoked.

It is hardly an answer that this Court can protect itself against feigned controversies. The difficulty is that in these modern multiple residence situations the issue of domicile is too often an inherently feigned issue. Two state courts can very legitimately find two different domiciles, in that two equally competent tribunals utilizing the same outward facts in the alembic of the same common law concept of domicile may easily distil contradictory conclusions. Merely to avoid such a conflict is not enough to give jurisdiction.[4] The variant that this case presents is the allegation that if the claims of all four states prevail the estate would be more than eaten up and Texas would lose her potential right. This added requirement—the absorption of the entire estate by having numerous states stake out claims—is too readily supplied.

To extend the neat procedural device of interpleader to such a situation is another illustration of transferring a remedy from one legal environment to circumstances qualitatively different. To settle the interests of different claimants to a single *res* where these interests turn on narrow and relatively few facts and where conflicting claims cannot have equal validity in experience, is one thing; it is a wholly different thing to bring into court

[4] The principle is thus formulated in the present case: "That two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within it in proceedings binding upon the representatives of the estate, but to which the other states are not parties, is an established principle of our federal jurisprudence." *Ante*, p. 410.

The decision of the Court therefore binds the states upon an issue of state law which this Court could not consider upon appeal from the state courts, and on which this Court would be bound to follow state law in all other proceedings instituted in the federal courts.

in a single suit all states which even remotely might assert domiciliary claims against a decedent and where one state court might with as much reason as another find domicile within its state. Certainly when the claim of the moving state is so obviously without basis as this Court has now found in the case of Texas, the linchpin of jurisdiction is gone and the other states should be remitted to appropriate remedies outside this Court. Such a disposition would be a real safeguard against the construction of a suit to give this Court jurisdiction over matters which as such, this Court has already held, are not within our province.[5] To find that the decedent could not, on self-serving grounds, elect to make his home in Texas "where he in fact had no residence" and yet to retain the bill and dispose of it on its merits amounts, in effect, to a declaration of rights on behalf of the estate which could not be adjudicated otherwise than through the screen of a controversy between states.

In this case we do not even have substantial translation into effective legal action of the assertions by the four states of their domiciliary claims. To be sure, the Master has found, as summarized in the Court's opinion, "that each of the four states in good faith asserts that the decedent was domiciled within it at his death." This is a natural attitude of prudence on the part of law officers of states in the case of decedents who had scattered their lives as well as their holdings. But to give this Court the extraordinary jurisdiction which is invoked, there ought to be more than these caveats. There should be manifestation of that hard determination to press a state's claim which is implied in setting the tax-collecting machinery of a state in motion. Allegation, affirmative proof, and finding of such attempts by the various states are lacking. And New York denies without contradic-

[5] See note 4, *supra*.

tion that its procedure for tax levy and collection has been set in operation.[6] These circumstances are, therefore, not comparable to the issues in a conventional interpleader suit brought to forestall conflicting actions. Initiation of litigation is, of course, not a prerequisite to an ordinary interpleader. This only serves to emphasize the inappropriateness of utilizing a remedy invented to settle private controversies of limited scope to the resolution of conflicting governmental interests.

Jurisdictional doubts inevitably lose force once leave has been given to file a bill, a master has been appointed, long hearings have been held, and a weighty report has been submitted. And so, were this the last as well as the first assumption of jurisdiction by this Court of a controversy like the present, even serious doubts about it might well go unexpressed. But if experience is any guide, the present decision will give momentum to kindred litigation and reliance upon it beyond the scope of the special facts of this case. To be sure, the Court's opinion endeavors to circumscribe carefully the bounds of jurisdiction now exercised. But legal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate difficulties which I have not been able to overcome and

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[6] "As yet, no one of the States has assessed and levied any death tax against the estate, and, if the matter were left to the ordinary procedure for the assessment of such taxes in the various States, it is highly improbable that determinations would be made in all of the States that Green was domiciled therein. In New York State, the only administrative official who has authority to determine whether or not the estate tax is assessable on the theory that Green was a resident of the State is the Surrogate of one of the counties and thus far no Surrogate has acted in this respect." Brief for the State of New York, p. 2.

potential abuses to which the doctrine is not unlikely to give rise.

I am authorized to say that MR. JUSTICE BLACK concurs in these views and in the conclusion that the bill should be dismissed.

On May 15, 1939, the following decree was entered in the above-entitled case:

DECREE.

This cause came on to be heard on the pleadings, evidence, and the exceptions filed by the parties to the Report of the Special Master, and was argued by counsel.

The Court having dismissed Mabel Harlow Green as a party defendant to the suit on January 17, 1938 (302 U. S. 662), pursuant to the stipulation filed by the parties, it is now here ordered, adjudged and decreed as follows:

1. The Report of the Special Master is confirmed.

2. The domicile of Edward Howland Robinson Green at the time of his death, June 8, 1936, was in fact and in law within the Commonwealth of Massachusetts and not within the State of Texas, the State of Florida, or the State of New York.

3. The cause will be retained upon the docket for such further action as may be necessary and proper and the parties or any of them may at any time hereafter apply for relief as they may be advised.

And it is further ordered that the costs in this case, including the compensation and expenses of the Special Master shall be paid one-fifth each by the State of Texas, State of Florida, State of New York, Commonwealth of Massachusetts, and Hetty Sylvia Ann Howland Green Wilks.

FAIRBANKS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 65. Argued February 28, 1939.—Decided March 27, 1939.

1. The redemption before maturity of corporate bonds is not a "sale or exchange" of capital assets within the meaning of § 208 (a) (1), Rev. Act 1926, and § 101 (c) (1), Rev. Act 1928, and the gain so realized by the bondholder is not a "capital gain," to be taxed at the 12½% rate, but is taxable at the normal and surtax rates. P. 437.
2. In providing expressly that amounts received by the holder upon the retirement of corporate bonds shall be considered as amounts received in exchange therefor, the Rev. Act of 1934 did not interpret, but changed the prior law. P. 438.

95 F. 2d 794, affirmed.

CERTIORARI, 305 U. S. 667, to review the affirmance of a judgment for the United States in an action in the District Court brought under § 610 of the Rev. Act 1928 to recover money erroneously refunded to a taxpayer.

Mr. William Stanley argued the cause, and *Mr. Arthur F. Driscoll* was on a brief, for petitioner.

Mr. Andrew D. Sharpe, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* were on the brief, for the United States.

By leave of Court, *Messrs. Carroll N. Perkins* and *Leonard A. Pierce* filed a brief on behalf of Frances M. Averill, as *amica curiae,* in support of petitioner.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Both courts below ruled that gain derived by the petitioner from redemption of bonds during 1927, 1928 and

1929 was not "capital gain" within the meaning of the controlling statutes.

No contest now exists concerning the facts. The narrow point as counsel agree is this—Must the redemption of bonds before maturity by the issuing corporation be treated as tantamount to a sale or exchange of capital assets within the meaning of § 208 (a) (1), Revenue Act 1926, and § 101 (c) (1), Revenue Act 1928.[1]

If redemption amounts to sale or exchange, the petitioner's gain was subject to taxation at the twelve and one-half per cent rate; otherwise, under normal and surtax rates.

Payment and discharge of a bond is neither sale nor exchange within the commonly accepted meaning of the words. The courts below found no sufficient reason for disregarding this and rightly applied the statutes under that view.

The Tax Acts of 1921, 1924, 1926, 1928 and 1932 contain like definitions of capital gain. From 1921 to 1929 the Commissioner held that such gain did not arise from redemption. In 1929 the Board of Tax Appeals held otherwise. Werner *v.* Commissioner, 15 B. T. A. 482. But in 1932 it definitely overruled that determination. Watson *v.* Commissioner, 27 B. T. A. 463.

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[1] Revenue Act 1921 (November 23, 1921, c. 136, 42 Stat. 227, 232) provides—

"Sec. 206. (a) That for the purpose of this title:

(1) The term 'capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921."

This provision without material change was reënacted by Revenue Act 1924 (June 2, 1924, c. 234, § 208 (a) (1), 43 Stat. 253, 262); Revenue Act 1926 (February 26, 1926, c. 27, § 208 (a) (1), 44 Stat. 9, 19); Revenue Act 1928 (May 29, 1928, c. 852, § 101 (c) (1), 45 Stat. 791, 811); Revenue Act of 1932 (June 6, 1932, c. 209, § 101 (c) (1), 47 Stat. 169, 191).

The Revenue Act 1934 (May 10, 1934, c. 277, 48 Stat. 680, 714–715) provides—

"SEC. 117. CAPITAL GAINS AND LOSSES.

(a) General Rule.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income: . . .

(f) Retirement of Bonds, Etc.—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor."

What we regard as the correct meaning of the definition of capital gain in the Revenue Act 1921 and its four successors is accentuated by long-continued executive construction, also the last conclusion of the Board of Tax Appeals.

The Circuit Court of Appeals below was right in holding that by the Act 1934 Congress did not attempt to construe the prior Acts and purposely made a material addition thereto. In *Averill* v. *Commissioner,* 101 F. 2d 644, the Circuit Court of Appeals First Circuit acted upon a different view. This conflict caused us to bring up the present cause notwithstanding the application for certiorari had been denied earlier in the term.

The challenged judgment must be

Affirmed.

Counsel for Parties.

CLASON *v.* INDIANA.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 517. Argued March 10, 1939.—Decided March 27, 1939.

An Indiana statute provides that the bodies of large dead animals (not slaughtered for human food) shall be promptly burnt or buried by the owners, on their premises, or be there by them delivered to the representative of a disposal plant licensed to do business within the State and be promptly carried to such plant in a sanitary vehicle and speedily rendered innocuous. *Held:*

1. That it is a comprehensive, practical public health measure within the power of the State. P. 441.

2. Permission to the owners to sell the carcasses to the licensed operators for disposition under the Act, is not a recognition by the State that such dead animals are legitimate articles of commerce. P. 443.

3. Prohibition against hauling such bodies on state highways except under license to a licensed disposal plant in the State, thereby preventing their transportation out of the State to be sold, which is not licensable under the Act, is not repugnant to the commerce clause. P. 443.

4. The mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people. P. 444.

214 Ind. 630; 17 N. E. 2d 92, affirmed.

APPEAL from a judgment sustaining a conviction of violation of the Indiana Animals Disposal Act of March 12, 1937, by transporting a dead horse over a highway of that State and into Illinois without license.

Mr. William H. Thompson, with whom *Mr. Albert L. Rabb* was on the brief, for appellant.

Messrs. Edward H. Knight and *Rexell A. Boyd,* Deputy Attorney General, of Indiana, with whom *Messrs. Omer Stokes Jackson,* Attorney General, *Urban C. Stover,* Deputy Attorney General, and *Harry M. Stitle, Jr.* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Supreme Court of Indiana affirmed a judgment which convicted appellant of violating section eleven of the Animals Disposal Act approved March 12, 1937 [1] (c. 278, Acts 1937) by transporting a dead horse over a highway of that State and into Illinois without license. For-

[1] Indiana Acts 1937, c. 278—

"Sec. 4. (a) No person shall engage in this state in the business of operating a disposal plant, as herein defined, without first obtaining for each such disposal plant so operated by him, or in his behalf, a license and any vehicle certificates required, as herein provided; and no person, except one holding a license to operate such a disposal plant in this state, or who is acting for such licensee, or who is otherwise excepted by this act, shall either transport over any highways of this state, or dispose of to any person, the bodies of any dead animals in any manner herein prescribed, or in any other manner not permitted by law.

"(b) The said state veterinarian shall keep a record of all applications for permits, licenses and vehicle certificates, showing all thereof issued, denied, or revoked by him, and such other facts as he may prescribe.

"Sec. 11. (a) No person, except as herein provided, may haul or transport over the highways of the State of Indiana the bodies of any dead animals, except those that have been slaughtered and are intended for human food, without first obtaining and holding a license issued under the provisions of this act and which bodies are being transported to a disposal plant located in this state and operated by a person holding a license to engage in such business.

"(b) No license shall be issued to any person solely for the purpose of transporting the bodies of dead animals, but such transportation must be done solely by persons holding a license for disposal plants, so that such dead bodies may be properly and promptly disposed of under the requirements of this act; except that any public official of this state, charged by law with such duties, may remove or supervise the removal of any such dead bodies and the disposal thereof by any method provided for by this act where necessary to protect the public health and welfare.

"(c) All vehicles used in the transportation of the bodies of dead animals, under the provisions of this act, shall have a tank or metal

bidden transportation is admitted; also that while license can be obtained under prescribed conditions for such transportation within the State it is prohibited for points outside.

Section eleven is a part of a comprehensive statute which requires, and undertakes to regulate, the prompt

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lining in the bed of such vehicle, or be otherwise so constructed that the same shall be practically watertight, so that no drippings or seeping from such dead bodies shall escape from such vehicles where this can be obviated; and all vehicles must have an end-gate constructed or lined with the same materials, and hinged at the bottom and fastened firmly at the top when closed and so designed, so far as practical, that drippings and seepings shall not escape from such part of said vehicle while engaged in such transportation; and every such vehicle shall have a bed of such depth and type of construction and equipment that any dead body or bodies therein shall be completely hidden from view of persons using the highways and any public nuisance obviated while being transported.

"(d) The state veterinarian may prescribe specific and also additional requirements, not inconsistent with the provisions and purposes of this act, governing and regulating such transportation and the construction, equipment, maintenance and operation of such vehicles.

"(e) After the bodies of dead animals have been unloaded from any vehicle used for the transportation thereof to the disposal plant, on each trip, such vehicle and all parts thereof, and in the event draught animals are used to draw such conveyances, the feet of such animals, shall be thoroughly cleansed and disinfected in such manner and with such a solution as the state veterinarian shall prescribe by regulation, and in addition thereto all such vehicles shall be washed out thoroughly with steam or hot water after each use thereof in transporting such dead bodies.

"(f) Vehicles, when loaded with the body of an animal which has died of disease, shall be driven directly to the place of disposal, except that the driver may stop on the highway for other like dead bodies, but he shall not drive upon the premises of any person unless he first obtains the permission of such person and he shall avoid creating any nuisance, during such transportation and in the event any drippings or seepage should escape from such vehicle, to his knowledge, he shall clean up the same and remedy such escape, if possible to do so."

disposition of large dead animals (not slaughtered for human food) under the general supervision of the State Veterinarian. The obvious purpose of the enactment is to prevent the spread of disease and the development of nuisances.

The prescribed plan exacts that within twenty-four hours after death owners shall bury or burn such bodies on their premises, or there deliver them to the representative of a disposal plant licensed to do business within the State. It further directs that the body shall be promptly carried to such plant in a sanitary vehicle and speedily rendered innocuous. The conveyance must be thoroughly and promptly disinfected at the plant.

The validity of the statute was unsuccessfully challenged on the ground that it unduly discriminates against and burdens interstate commerce and thereby violates the Federal Constitution. The Supreme Court of the State reviewed the statute; pointed out its purpose to suppress obvious danger to public health; referred to the means adopted as reasonably appropriate to that end; quoted from *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465, 489.[2] It concluded that dead bodies of animals not

[2] "Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution." *Bowman* v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465, 489.

slaughtered for food are not legitimate subjects of commerce; that the statute is an appropriate sanitary measure whose effect upon interstate commerce, if any, is merely incidental.

As the precise point for our determination, counsel for appellant submit the following—

"The Supreme Court of Indiana erred in holding that the Indiana Dead Animal Disposal Act of 1937 was valid as a reasonable regulation or quarantine and not invalid as a discriminatory prohibition of interstate commerce in commodities recognized as legitimate articles of intrastate commerce, contrary to Article I, Section 8, Clause 3, of the Constitution of the United States."

It seems plain enough that the challenged statute is a sanitary and health measure not intended to cause discrimination against or to burden interstate commerce. Its purpose is to promote the health of the people of the State in feasible ways.

"The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. . . . Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the State." *Sligh* v. *Kirkwood,* 237 U. S. 52, 59–60.

Here, contrary to what seems to be the insistence of counsel, the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant there to be rendered

innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils.

We can find no substantial basis for the charge of discrimination against legitimate interstate commerce. That any real burden upon commerce which the State is not free to inhibit will result from the challenged statute seems impossible.

There is no suggestion of conflict with a federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people. The statute under consideration is an effort to discharge an obligation to the public; the means adopted we think are clearly appropriate to this lawful end.

The judgment of the court below must be

Affirmed.

SMITH ET AL., CO-PARTNERS, TRADING AS H. J. BAKER & BRO. *v.* THE FERNCLIFF ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 548. Argued March 2, 1939.—Decided March 27, 1939.

1. Provision in a marine bill of lading that carrier's liability for damage to goods on delivery shall be adjusted and settled on invoice cost plus disbursements, *held* valid. *Ansaldo San Giorgio I* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, distinguished. P. 448.
2. The damages, as measured by this clause, are computed by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause, not by applying to the invoice value the percentage of loss of the damaged goods, based on difference between sound value and damaged value. P. 450.

RESPONSE to questions propounded by certificate of the court below in an admiralty case, on appeal to that court from the District Court. 22 F. Supp. 728, 741–742.

Mr. Charles R. Hickox, with whom *Mr. George W. Whip* was on the brief, for Smith et al.

Messrs. George Whitefield Betts, Jr. and *George Forbes,* with whom *Mr. Henry L. Wortche* was on the brief, for The Ferncliff et al.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Circuit Court of Appeals, Fourth Circuit, has certified to us the following Statement of Facts and Questions (U. S. C. Title 28, § 346)—

"STATEMENT OF FACTS.

"This was a suit in admiralty to recover damages to shipments of fish meal made in March 1936 [on Motorship Ferncliff] from points in Japan to consignees in Norfolk, Va. and Baltimore, Md. under bills of lading containing the following provision:

"'All claims for which the ship and or carrier may be liable shall be adjusted and settled on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be the least. The carrier shall not be liable for any profit or consequential or special damages, and shall have the option of replacing any lost or damaged goods.'

"No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him. [The record shows that no value was declared by the shipper on the shipment in question.]

"The invoice cost of the fish meal was $32.50 per ton. The value of the damaged portion of the shipment upon arrival at the ports of destination was $25.00 per ton. The market value of undamaged fish meal at the ports of destination at the time of the arrival of the shipment was $36.00 per ton.

"The court below held the valuation clause valid and computed the damages on the basis of the difference between the invoice cost ($32.50 per ton) and the value of the damaged fish meal at the time and place of delivery ($25.00 per ton).

"Appellants, while not contending before us that the clause quoted is absolutely invalid, contend that in view of the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co.,* 294 U. S. 494, its validity can be sustained only if it be construed as requiring that, in estimating damages, the percentage of loss on the damaged shipment be ascertained and applied to the invoice cost. Under this contention, the loss here would be determined, not by deducting the value upon arrival ($25.00 per ton) from the invoice cost ($32.50 per ton), but by ascertaining the proportion of the invoice cost ($32.50) corresponding to the proportion which the actual loss ($36.00−$25.00= $11.00) bears to sound value ($36.00), i. e. by taking $^{11}/_{36}$ of $32.50. It is pointed out that this is the method used in calculating the amount of loss under a valued marine insurance policy on cargo and also the method prescribed by rule 16 of the York-Antwerp rules for a general average adjustment. And it was stated at the bar of the court by counsel for appellant that the same method has been generally employed in estimating cargo damage since the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co., supra.* [At the time this statement of counsel was made it was challenged by opposing counsel and nothing appears in the record with regard thereto.]

"In the absence of the decision in the *Ansaldo San Giorgio* case, we should affirm the decision below on the authority of *Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37; *Pennsylvania R. Co.* v. *Olivit Bros.*, 243 U. S. 574, 586; *Hart* v. *Pennsylvania R. Co.*, 112 U. S. 331; *The Californian*, 2 Cir., 82 F. 2d 283; *Duplan Silk Co.* v. *Lehigh Valley R. Co.*, 2 Cir., 223 F. 600; and *The Oneida*, 2 Cir., 128 F. 687. In view of that decision, however, we are divided and in doubt as to the validity of such a clause as is here involved and as to the method which should be employed in computing damages under it. Notwithstanding the passage of the Carriage of Goods by Sea Act of April 16, 1936, c. 229, § 4, 49 Stat. 1210, 46 U. S. C. 1304 (5), the question as to the correct method of computing damages under a valuation clause is deemed an important one, as to which an authoritative decision would seem desirable. We, therefore, respectfully certify to the Supreme Court of the United States the following questions of law as indispensable to a proper decision of this case:

"QUESTIONS.

"1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding upon the parties?

"2. If so, should damages to a shipment be ascertained, under such a valuation clause, by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause?

"3. Or, should the percentage of loss of the damaged goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?"

Ansaldo San Giorgio I v. *Rheinstrom Bros. Co.*, 294 U. S. 494, considered and held invalid, because against sound public policy, the following limitation agreement in a maritime bill of lading: "In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred." The opinion did not adjudicate the validity or effect of a clause, such as the one now before us, where the parties adopted "an agreed value as a measure of recovery for loss or damage to goods not delivered by the carrier or damaged in transit," and it does not control the questions here involved.

The clause in question prescribes a measure of recovery rather than limits the amount which may be recovered when loss or damage occurs. For a long time, in the absence of a controlling statute, fraud or imposition, such provisions in bills of lading have been recognized as valid by this and other federal courts. Also by many—perhaps a majority—of the state courts. *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331, 337–340; *Phoenix Insurance Co.* v. *Erie & W. Transportation Co.*, 117 U. S. 312, 322; *Pennsylvania R. Co.* v. *Olivit Bros.*, 243 U. S. 574, 586; *Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37; *The Ellerdale*, 10 F. 2d 53; *The Asuarca*, 13 F. 2d 222, 223; *The Merauke*, 31 F. 2d 974; *Kilthau* v. *International Mercantile Marine Co.*, 245 N. Y. 361, 365; 157 N. E. 267; *Coleman* v. *New York, N. H. & H. R. Co.*, 215 Mass. 45, 49; 102 N. E. 92; Shaffer & Co. v. Chicago, R. I. & P. Ry. Co., 21 I. C. C. 8; In the Matter of Bills of Lading, 52 I. C. C. 671, 710; Note, Lawyers' Reports Anno. 1918B, 720, where the pertinent cases are collected.

Chicago, M. & St. P. Ry. Co. v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 98, 99–100, involved the following clause in a bill issued by the railway—"The amount of any loss or damage for which any carrier is liable shall be computed

on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." We said—

"Before the passage of this amendment [The Cummins Amendment, Act March 4, 1915, c. 176, 38 Stat. 1196] the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods but merely offering the most convenient way of finding the value. . . . We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates upon this case."

The clause was declared inoperative because forbidden by the Cummins Amendment, which did not extend to ocean carriers. *Union Pacific R. Co.* v. *Burke,* 255 U. S. 317, 322.

The District Court upheld and applied the agreement, and supported its views by a careful opinion—(22 F. Supp. 728, 742–744). It said—

"The clause we are here dealing with does not appear to operate in that way [i. e., 'to relieve the carrier from the consequences of its negligence']. . . . The clause is gratified by determining the amount of the whole tonnage damaged, and multiplying by the damage per ton. . . . In operation the clause only eliminates prospective profit, and limits the damage to the owner's actual loss in the transaction. It may even operate to his advantage if the market value at destination is less than the invoice value. In my opinion the clause is therefore different in its operation and effect from that condemned in the Ansaldo case. [294 U. S. 494.]

"In the Ansaldo Case two general types of valuation clauses were considered, one described as a 'true limitation agreement' and the other as a 'true valuation clause.' The one involved in this case would seem to fall in the latter category. . . . I take the view after reading the cases specially cited in the opinion and other consideration of the subject, that the clause as here worded is not against public policy and should be given effect. . . . The general rule of our law is freedom of contract, subject only to statute and considerations of the public interest. Where a contract stipulation is not clearly opposed to public policy it should be upheld, as it is the agreement of the parties. The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act, § 4 (5), 46 U. S. C. A. § 1304 (5).

. . . . . .

"Assuming the validity of the bill of lading clause that claims against the carrier shall be adjusted and settled on the net invoice cost plus disbursements . . . it is now contended that the proper method of calculation is to first determine what was the percentage of damage or loss, and then apply this percentage to the invoice value.

. . . . . .

"Counsel for the libelants point out that this is the method of calculating the amount of loss under a *valued marine insurance policy on cargo*. . . . It is frankly admitted by counsel that this method of calculating damages has never heretofore been applied by any court in a case dealing with a clause submitting [*sic*] invoice value for market value. On the contrary it is my understanding that the calculation as made in the opinion, which was to deduct from the invoice value (which in this case in-

cluded freight and other expenses) the damaged value has been uniformly applied."

We think the District Court reached the correct conclusion in respect of the mooted clause upon adequate authority and reasoning.

To the first certified question, we reply, *Yes* where there has been no fraud or imposition; to the second the answer is, *Yes;* to the third, *No.*

LANZETTA ET AL. *v.* NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 308. Argued January 9, 1939.—Decided March 27, 1939.

An Act of New Jersey declares: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is declared to be a gangster . . ." Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both. *Held* repugnant to the due process clause of the Fourteenth Amendment, because of its vaguenes and uncertainty. P. 453.

120 N. J. L. 189; 198 A. 837, reversed.

APPEAL from a judgment affirming a conviction and sentence of three men as gangsters. See also 118 N. J. L. 212; 192 A. 89.

Mr. Samuel Kagle, with whom *Messrs. George C. Klauder* and *Harry A. Mackey* were on the brief, for appellants.

Messrs. Robert Peacock, Assistant Attorney General of New Jersey, and *French B. Loveland,* for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

By this appeal we are called on to decide whether, by reason of vagueness and uncertainty, a recent enactment of New Jersey, § 4, c. 155, Laws 1934, is repugnant to the due process clause of the Fourteenth Amendment. It is as follows: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster . . ."[1] Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both. § 5.

In the court of quarter sessions of Cape May County, appellants were accused of violating the quoted clause. The indictment charges that on four days, June 12, 16, 19, and 24, 1936 "they, and each of them, not being engaged in any lawful occupation; they, and all of them, known to be members of a gang, consisting of two or more persons, and they, and each of them, having been convicted of a crime in the State of Pennsylvania, are hereby declared to be gangsters." There was a trial, verdict of guilty, and judgment of conviction on which each was sentenced to be imprisoned in the state prison for not more than ten years and not less than five years, at hard labor. On the authority of its recent decision in *State* v. *Bell*, 188 A. 737; 15 N. J. Misc. 109, the supreme court entered judgment affirming the conviction. 118 N. J. L. 212; 192 A. 89. The court of errors and appeals affirmed, 120 N. J. L. 189; 197 A. 360, on the authority of its deci-

[1] The section continues: "*provided, however,* that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute." The proviso is not here involved.

sion, *State* v. *Gaynor*, 119 N. J. L. 582; 198 A. 837, affirming *State* v. *Bell*.

If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. *United States* v. *Reese*, 92 U. S. 214, 221; *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg* v. *California*, 283 U. S. 359, 368; *Lovell* v. *Griffin*, 303 U. S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.[2] The applicable rule is stated in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The phrase "consisting of two or more persons" is all that purports to define "gang." The meanings of that

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[2] *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242, 243. *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 458. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391–393. *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 239. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89–92. *Collins* v. *Kentucky*, 234 U. S. 634, 638. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221–223. Cf. *People* v. *Belcastro*, 356 Ill. 144; 190 N. E. 301. *People* v. *Licavoli*, 264 Mich. 643; 250 N. W. 520.

word indicated in dictionaries and in historical and sociological writings are numerous and varied.[3] Nor is the

[3] American dictionaries define the word as follows:

Webster's New International Dictionary (2d ed.): "gang . . . Act, manner, or means of going; passage, course, or journey . . . A set or full complement of any articles; an outfit. A number going in or forming a company; as, a *gang* of sailors; a *gang* of elk. Specif.: . . . A group of persons associated under the same direction; as a *gang* of pavers; a *gang* of slaves . . . A company of persons acting together for some purpose; usually criminal, or at least not good or respectable; as, a political *gang;* a *gang* of roughs. . . ."

Funk & Wagnalls New Standard Dictionary (1915): "gang . . . A company or band of persons, or sometimes of animals, going or acting together; a group or squad: sometimes implying coöperation for evil or disreputable purposes; as, a *gang* of laborers; a *gang* of burglars; he set the whole *gang* at work. . . ."

Century Dictionary and Cyclopedia (1903): "gang . . . A number going or acting in company, whether of persons or of animals: as, a gang of drovers; a gang of elks. Specifically—(a) A number of persons associated for a particular purpose or on a particular occasion: used especially in a depreciatory or contemptuous sense or of disreputable persons: as, a gang of thieves; a chain-gang . . . (b) A number of workmen or laborers of any kind engaged on any piece of work under supervision of one person; a squad; more particularly, a shift of men; a set of laborers working together during the same hours. . . ."

Part of the text of the definitions given by the Oxford English Dictionary (1933) reads: "gang . . . A set of things or persons . . . A company of workmen . . . A company of slaves or prisoners . . . Any band or company of persons who go about together or act in concert (chiefly in a bad or depreciatory sense, and in mod. usage mainly associated with criminal societies) . . . *To be of a gang:* to belong to the same society, to have the same interests. . . ."

Another English dictionary, Wyld's Universal Dictionary of the English Language, defines the word as follows: "gang . . . 1. A band, group, squad; (a) of labourers working together; (b) of slaves, prisoners &c. 2. (in bad sense) (a) A group of persons organized for evil or criminal purpose: a gang of burglars &c; (b) (colloq., in

meaning derivable from the common law,[4] for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a "gang." [5]

In *State* v. *Gaynor, supra,* the court of errors and appeals dealt with the word. It said: "Public policy ordains that a combination designed to wage war upon society shall be dispersed and its members rendered incapable of harm. This is the objective of section 4 . . . and it is therefore a valid exercise of the legislative power. . . . The evident aim of this provision was to render penal the association of criminals for the pursuit of criminal enterprises; that is the gist of the legislative expression. It cannot be gainsaid that such was within the competency of the legislature; the mere statement of the purpose carries justification of the act. . . . If society cannot impose such taint of illegality upon the confederation of convicted criminals, who have no lawful occupation, under circumstances denoting . . . the pursuit of criminal objectives, it is helpless against one of the most menacing forms of evil activity. . . . The primary function of government . . . is to render security to its subjects.

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disparagement) a body, party, group, of persons: "I am sick of the whole gang of university wire-pullers. . . ."

See: Asbury, Herbert, *The Gangs of New York,* 1927, Alfred A. Knopf. Thrasher, Frederic M., "Gangs" in Encyclopaedia of the Social Sciences, 1931, vol. 6, p. 564, and *The Gang: A study of 1313 Gangs in Chicago,* 1927, University of Chicago Press.

[4] See, e. g., *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 242–243. *Connally* v. *General Const. Co.,* 269 U. S. 385, 391. *Nash* v. *United States,* 229 U. S. 373.

[5] Cf. Kans. Laws 1935, c. 161. Ill. Laws 1933, p. 489, held unconstitutional in *People* v. *Belcastro,* 356 Ill. 144; 190 N. E. 301. Mich. Comp. Laws (Mason, Supp. 1935) § 17115–167, held unconstitutional in *People* v. *Licavoli,* 264 Mich. 643; 250 N. W. 520.

And any mischief menacing that security demands a remedy commensurate with the evil."

Then undertaking to find the meaning of "gang" as used in the challenged enactment, the opinion states: "In the construction of the provision, the word is to be given a meaning consistent with the general object of the statute. In its original sense it signifies action—'to go'; in its modern usage, without qualification, it denotes—in common intent and understanding—criminal action. It is defined as 'a company of persons acting together for some purpose, usually criminal,' while the term 'gangster' is defined as 'a member of a gang of roughs, hireling criminals, thieves, or the like.' Webster's New International Dictionary (2d ed.). And the Oxford English Dictionary likewise defines the word 'gang' as 'any company of persons who go about together or act in concert [in modern use mainly for criminal purposes].' Such is plainly the legislative sense of the term."

If worded in accordance with the court's explication, the challenged provision would read as follows: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons (meaning a company of persons acting together for some purpose, usually criminal, or a company of persons who go about together or who act in concert, mainly for criminal purposes), who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other State, is declared to be a gangster (meaning a member of a gang of roughs, hireling criminals, thieves, or the like)."

Appellants were convicted before the opinion in *State* v. *Gaynor*. It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court. Indeed the state supreme

court (*State* v. *Bell, supra*) went on supposed analogy between "gang" and offenses denounced by the Disorderly Persons Act, Comp. Stat. Supp. 1930, § 59–1 upheld by the court of errors and appeals in *Levine* v. *State,* 110 N. J. L. 467, 470; 166 A. 330. But the court in that case found the meaning of "common burglar" there involved to be derivable from the common law.

The descriptions and illustrations used by the court to indicate the meaning of "gang" are not sufficient to constitute definition, inclusive or exclusive. The court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it does not purport to give any interpretation generally applicable. The state court did not find, and we cannot, that "gang" has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or of anything that is unlawful. The dictionary definitions adopted by the state court extend to persons acting together for some purpose, "usually criminal," or "mainly for criminal purposes." So defined, the purposes of those constituting some gangs may be commendable, as, for example, groups of workers engaged under leadership in any lawful undertaking. The statute does not declare every member to be a "gangster" or punishable as such. Under it, no member is a gangster or offender unless convicted of being a disorderly person or of crime as specified. It cannot be said that the court intended to give "gangster" a meaning broad enough to include anyone who had not been so convicted or to limit its meaning to the field covered by the words that it found in a dictionary, "roughs, hireling criminals, thieves, or the like." The latter interpretation would include some obviously not within the statute and would exclude some plainly covered by it.

The lack of certainty of the challenged provision is not limited to the word "gang" or to its dependent "gangster." Without resolving the serious doubts arising from the generality of the language, we assume that the clause "any person not engaged in any lawful occupation" is sufficient to identify a class to which must belong all capable of becoming gangsters within the terms of the provision. The enactment employs the expression, "known to be a member." It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact, and the word "known" would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a "gang."

The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

CHESEBRO *v.* LOS ANGELES COUNTY FLOOD CONTROL DISTRICT ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 368. Argued February 1, 2, 1939.—Decided March 27, 1939.

1. By an amendment of the Los Angeles County Flood Control Act, the flood control district created by that Act was authorized to acquire certain designated drainage improvements located in a number of drainage districts embraced within the flood control district, and to levy special assessments upon real estate within the flood control district to meet drainage district obligations thereupon assumed by the flood control district. An owner of land located within the flood control district, but outside of any of the drainage districts involved, sought by a proceeding in the state court to prevent assessments under the amending Act, on the ground that he was entitled to a hearing on the question of benefits and that without such opportunity his property would be taken without due process of law in violation of the Fourteenth Amendment. The state court ruled in effect that the legislature had impliedly made a finding as to benefits and that therefore owners were not entitled to be heard on that question. On appeal to this Court, the owner contends that there was no foundation for the ruling of the state court that the legislature had made a finding of benefits, and insists that the amending Act deprives him of his constitutional right to be heard. *Held:*

   (1) The validity of the statute was appropriately drawn in question in the state court, and its decision in substance was in favor of the validity. P. 463.

   (2) The question presented is not foreclosed by previous decisions of this Court nor so clearly undebatable as to require dismissal for lack of substance. P. 463.

   (3) A contention that the judgment of the state court rested upon an independent and adequate non-federal ground lacked merit. P. 463.

   (4) The state court's ruling that impliedly the legislature made the requisite findings as to benefits was not without adequate foundation and its judgment must be sustained. P. 466.

2. Where, within the scope of its power, the legislature itself has found that the lands embraced within a special assessment district will be

specially benefited by certain improvements, prior appropriate and adequate inquiry is presumed and, in the absence of flagrant abuse or purely arbitrary action, the finding is conclusive. Formal or express findings are not essential. P. 464.

11 Cal. 2d 395; 80 P. 2d 479, affirmed.

APPEAL from a judgment of the state supreme court denying a writ of mandate. As to the City of Los Angeles, a co-appellant, the appeal was dismissed for want of a federal question, 305 U. S. 564.

Mr. Bourke Jones, with whom *Messrs. Ray L. Chesebro, Frederick Von Schrader,* and *William H. Neal* were on the brief, for appellants.

Mr. W. B. McKesson, with whom *Mr. U. T. Clotfelter* was on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellant maintains that a California statute authorizing an administrative board to levy special assessments on his land within a flood control district created by the legislature to pay cost of local improvements and facilities and of their operation, maintenance, and betterment, without providing him an opportunity to be heard on the question of benefits, is repugnant to the due process clause of the Fourteenth Amendment.

Chapter 755, Statutes 1915, creates the Los Angeles flood control district. Section 2 declares that the purposes of the act are to provide for the control of the flood and storm waters of the district, to conserve them for beneficial uses, and to protect the property within the district from damage by flood or storm waters. Section 16 empowers the board of supervisors of the district to construct all improvements and to acquire all property that is necessary or useful for carrying out the purposes of the act.

Chapter 642, Statutes 1937, added § 13½ to the flood control act. It provides: The board of supervisors of the district may accept on its behalf, a transfer and conveyance of "all, but not less than all," storm drain improvements, drainage improvements or drainage systems of defined classes lying within the district. Upon conveyance to the district of any such drainage works it shall become liable for principal and interest of bonds thereafter maturing which were issued by any drainage district to pay the cost of constructing the transferred property. For that purpose the board shall levy a special tax each year upon the taxable real estate in the district.

A map, that with appellant's consent is included in appellees' brief, shows that the flood control district is within and nearly as large as Los Angeles county which contains almost 4,000 square miles and that within it there are eleven drainage districts, two of which were organized under Chapter 258, Statutes 1903, and amendatory acts, and nine of which were organized under Chapter 354, Statutes 1919, and amendatory acts.*

Appellant and the city of Los Angeles presented to the highest court of the State their petition for a peremptory writ of mandate. In substance it alleges: Petitioners own taxable real property within the flood control district and outside the drainage districts. December 1, 1937, the board of supervisors of the district accepted a transfer to the district of the improvements and systems of the eleven drainage districts. The board intends to levy annual special assessments against all real estate in that

*The two districts organized under the act of 1903 and amendatory acts are No. 1, containing 2093 acres, and No. 3, containing 835 acres. The numbers and areas of the nine organized under the act of 1919 and amendatory acts are as follows: 8,—5785 acres; 9,—503 acres; 11,—3067 acres; 17,—103 acres; 22,—4017 acres; 23,—8786 acres; 25,—72 acres; 26,—2199 acres; 29,—1261 acres.

district sufficient to meet the outstanding obligations incurred on account of the works so transferred. The levy of these assessments will be illegal in that they will be levied against property situated in the flood control district to pay the debts and obligations of other special assessment districts without regard to the accrual of benefits to the lands assessed and will deprive petitioners of their property without due process of law in violation of the Fourteenth Amendment. The petition prays a peremptory writ of mandate to require appellees to levy assessments in accordance with Chapter 755, Statutes 1915, as it was prior to the addition of § 13½ and to command them to refrain from levying any assessment under that section.

Appellees demurred on the ground that the petition failed to state facts sufficient to constitute a cause of action. The state court sustained that contention and denied the writ. It ruled: A finding by the legislature that lands within the flood control district would be benefited by that district's acquisition of the works of the drainage districts is conclusive unless shown to be without reasonable foundation. It must be presumed that, by designating in § 13½ the improvements authorized to be transferred, the legislature found that the entire flood control district would be specially benefited by the acquisition. The particularity of the description implies such a finding. The finding thus implied is as fully effective as if declared in express terms in the act itself.

Petitioners appealed to this court; appellees moved, as to the city, to dismiss or affirm on the ground that no federal question was involved; and, as to both appellants, on the grounds that no substantial federal question was presented, and that the decision below rests upon adequate non-federal grounds. We dismissed the city's appeal for want of a substantial federal question and postponed to the hearing on the merits further consideration

of the question of jurisdiction and of the motion to dismiss or affirm. 305 U. S. 564.

That motion is denied. The validity of the statute under the federal constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. See *Bryant* v. *Zimmerman,* 278 U. S. 63, 67–69. Its judgment does not depend upon characterization of the statute or mere interpretation of the language employed. Its decision is to the effect that the legislature found that the real property within the flood control district would be specially benefited by the acquisition of the district drainage works and that therefore the appellant and other owners are not entitled to be heard on the question of benefits. Appellant contends there is no foundation for the ruling that the legislature made that determination and that, as put in operation and effect by the State, § 13½ deprives him of his constitutional right to be heard. See *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 237. *Railroad Commission* v. *Eastern Texas R. Co.,* 264 U. S. 79, 86. *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 206–207. We are unable to say that the question is foreclosed by our decisions or that it is so clearly not debatable as to require dismissal for lack of substance. *Hamilton* v. *Regents,* 293 U. S. 245, 258. *Alton Railroad Co.* v. *Illinois Commerce Comm'n,* 305 U. S. 548. Nor do we find any merit in the contention that the judgment rests upon an independent non-federal ground.

But we are of opinion that the judgment is right and must be affirmed.

In the absence of flagrant abuse or purely arbitrary action, the State, consistently with the federal constitution, may establish local districts to include real property that it finds will be specially benefited by drainage, flood

control, or other improvements therein, and, to acquire, construct, maintain and operate the same, may impose special tax burdens upon the lands benefited. *Hagar* v. *Reclamation Dist.,* 111 U. S. 701, 704–705. *Spencer* v. *Merchant,* 125 U. S. 345, 355. *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 342. And see *Houck* v. *Little River Drainage Dist.,* 239 U. S. 254, 262. And where, within the scope of its power, the legislature itself has found that the lands included in the district will be specially benefited by the improvements, prior appropriate and adequate inquiry is presumed, and the finding is conclusive. *Parsons* v. *District of Columbia,* 170 U. S. 45, 52. *Wagner, Inc.* v. *Leser,* 239 U. S. 207, 218. *Withnell* v. *Ruecking Const. Co.,* 249 U. S. 63, 69. *Hancock* v. *Muskogee,* 250 U. S. 454, 458. *Branson* v. *Bush,* 251 U. S. 182, 189–190. *Valley Farms Co.* v. *Westchester,* 261 U. S. 155, 162 *et seq.* *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, 721. But where the district was not directly created by the legislature and there has been no determination by it that their property will be benefited by the local improvements the owners are entitled, under the due process clause of the Fourteenth Amendment, to be heard by some officer or tribunal empowered by the State to hear them and to consider and decide whether their lands will be specially benefited. *Fallbrook Irrigation Dist.* v. *Bradley,* 164 U. S. 112, 167. *Embree* v. *Kansas City Road Dist.,* 240 U. S. 242, 247. *Browning* v. *Hooper,* 269 U. S. 396, 405, 406.

The legislature need not adopt any form of statement or finding for, in the enforcement of restraints imposed by the federal constitution upon the power of States to assess and collect taxes, this Court regards the substance of their enactments as controlling rather than mere forms of expression employed. *Londoner* v. *Denver,* 210 U. S. 373, 385. Appellant does not suggest that as a matter of fact his land is not by the drainage works specially bene-

fited or that a finding that it is so benefited would be without foundation or arbitrary. Indeed, he concedes that, if the legislature either by designating the territory to comprise the district or by expressly so declaring has made the finding, he is bound by it.

As shown by the opinion below, the state court long before the addition of § 13½, held that the mere passage of the flood control act, which did not contain a direct statement to that effect, "must be taken to import a finding by the legislature that the proposed work will answer a public purpose and that its execution will benefit the land within the district to such an extent as to warrant the imposition upon such land of the cost in the manner provided. The findings thus implied are as fully effective as if declared in express terms in the act itself." *Los Angeles Flood Control Dist.* v. *Hamilton,* 177 Cal. 119, 124–125; 169 P. 1028, 1030. The court deemed that language applicable in disposing of appellant's contentions in this case. And we think that as the legislature had knowledge of that decision when enacting the challenged provision, it must be given great weight in determining the validity of § 13½.

The flood control district had long been in existence and empowered to acquire property necessary for its purposes. Section 13½ limited the board's authority to acceptance of "all, but not less than all" the drainage works and defined the tax burden to be imposed. The legislation is not to be distinguished from a measure to take effect upon an event unrelated to the creation of the district or the imposition of special assessments.

No question is raised as to the validity of the flood control district or its authority to levy special assessments on lands within it. By the enactment of the challenged section, the legislature unquestionably intended that the use of the drainage works should not be limited to the purposes for which originally they were intended but

that they should also be used in connection with other facilities for the purposes of the flood control district. The challenged section was not enacted to create a new assessment district but specially to authorize the one already established to accept, maintain, and use the designated improvements for some of the purposes enumerated in the flood control act. The essential features of the challenged statute necessarily imply special benefits to the lands in question. We think the state court's ruling that impliedly the legislature made the requisite findings is not without adequate foundation. Mere lack of formal or express statement of them is not sufficient to require reversal.

Judgment affirmed.

GRAVES ET AL., COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK, *v.* NEW YORK EX REL. O'KEEFE.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 478. Argued March 6, 1939.—Decided March 27, 1939.

1. The receipt of salary by a resident of New York as an examining attorney for the Federal Home Owners' Loan Corporation, is constitutionally subject to non-discriminatory taxation by a State. P. 475.
2. For the purposes of this case it is assumed that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal Government, and that all activities of the Government constitutionally authorized by Congress are governmental and stand on a parity with respect to immunity from state taxation. P. 477.
3. Whether Congress, as an incident to the exercise of specifically granted powers, has power to grant tax exemptions extending beyond the constitutional immunity of federal agencies which courts may imply, is a question not determined in this case. P. 478.

4. No purpose of Congress either to grant or to withhold immunity from state taxation of salaries of employees of the Home Owners' Loan Corporation is expressed or implied in the Home Owners' Loan Act of 1933, 48 Stat. 128, or is to be inferred from the silence of Congress. P. 479.
5. A tax on income is not legally or economically a tax on its source, and there is no basis for the assumption that the economic burden of a non-discriminatory state income tax on the salary of an employee of the National Government or of a governmental agency is passed on so as to impose a burden on the National Government tantamount to an unconstitutional interference by the one government with the other in the performance of its functions. P. 480.
6. Assuming that the Home Owners' Loan Corporation is clothed with the same constitutional immunity from state taxation as the Government itself, it can not be said that the present tax on the income of its employees lays any unconstitutional burden upon it. P. 486.
7. *Collector* v. *Day,* 11 Wall. 113, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, are overruled in so far as they recognize an implied constitutional immunity from non-discriminating income taxation of the salaries of officers or employees of the national or state governments or their instrumentalities. *Id.*

278 N. Y. 691; 16 N. E. 2d 404, reversed.

CERTIORARI, 305 U. S. 592, to review the affirmance of an order, 253 App. Div. 91; 1 N. Y. S. 2d 195, setting aside a decision of the Tax Commission of the State of New York rejecting a claim for refund of a tax.

Mr. Henry Epstein, Solicitor General of New York, with whom *Messrs. John J. Bennett, Jr.,* Attorney General, *Joseph M. Mesnig,* and *Austin J. Tobin* were on the brief, for petitioners.

Employees and officers of the Home Owners' Loan Corporation enjoy no constitutional or statutory immunity from non-discriminatory state taxation of their salaries.

Interference with the operation of government furnishes an appropriate test for immunity from taxation.

By such test no immunity should be accorded the taxpayer here.

The taxpayer is not an employee of the United States.

The salary is paid by the Corporation pursuant to § 4 (j) of the Home Owners' Loan Act of 1933, which clearly delineates the distinction between officers or employees like respondent and officers or employees of the United States.

The Home Owners' Loan Corporation has all the earmarks of a regular private business corporation.

We note the extended and wholly impertinent argument of the Department of Justice addressed to the proposition that this Court should now, in this case, reconsider and overrule *Collector* v. *Day,* 11 Wall. 113, and subsequent cases in line therewith. Since the instant case involves no such issue or question; since we respect the repeated admonition of this Court to confine discussion to the facts and issues of law concerned in the case at bar, and none other; since the issue thus extraneously raised by the Government's brief will inevitably come before the Court in a case where the issue may be squarely presented and the vital constitutional questions therein involved fully argued and considered—for these reasons the petitioners must decline to be drawn into a discussion of the proposition thus irrelevantly sought to be injected into the instant appeal. For the same reasons we most earnestly trust and pray that this Court will adhere to its traditional philosophy of the judicial process and decline the Government's invitation to make the "digression from the particular case before the Court."

Mr. Daniel McNamara, Jr. for respondent.

The functions of the Home Owners' Loan Corporation are essential to the preservation of the general welfare and the promotion of economic security.

A wholly-owned instrumentality of the United States, lawfully created and used to carry into effect constitutional powers, the Home Owners' Loan Corporation is immune from state taxation. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Dobbins* v. *Commissioners,* 16 Pet. 435; *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *Clallam County* v. *United States,* 263 U. S. 341; *New Brunswick* v. *United States,* 276 U. S. 547.

The immunity rests upon an entire absence of the power to tax. *Johnson* v. *Maryland,* 254 U. S. 151; *Rogers* v. *Graves,* 299 U. S. 401.

The State can not by any form of taxation impose any burden upon a national power or function. *Weston* v. *Charleston,* 2 Pet. 449; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 513.

Congress may enlarge the federal immunity if necessary to protect the performance of the functions of the National Government. *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160–161.

Although the Court in *Van Allen* v. *The Assessors,* 3 Wall. 573, suggested that Congress might curtail a federal immunity that might otherwise be implied, the Court, upon full consideration, in the case of *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, said: "It may be doubted whether Congress has the power to confer upon the state the right to tax obligations of the United States." See *Farmers Bank* v. *Minnesota,* 232 U. S. 516.

The immunity is not a private boon but a limitation imposed in the public interest. *Evans* v. *Gore,* 253 U. S. 245.

Helvering v. *Gerhardt,* 304 U. S. 405, recognizes that there are many state employees remaining immune despite the fact that the tax affects the State only as the burden is passed on to it. The effect of this decision is to deny immunity when the burden of such taxation on

the State is speculative and uncertain to the degree mentioned in that opinion.

If it were necessary to show the burden of state income tax on the Home Owners' Loan Corporation, that can readily be demonstrated.

The diverse provisions in the several States requiring information reports to be filed by the employer, and provisions for withholding tax, constitute a real burden and expense if the Corporation be required to conform thereto, and the physical labor involved in preparation of information returns will impair, impede and prejudice this governmental function. *National Bank* v. *Kentucky,* 9 Wall. 353, 362.

The state income tax compels consideration in determining salaries and would increase the operating expense of the Corporation.

In attempting to reflect the divers income taxes, an administrative agency is confronted with an impossible task in the matter of classification and equalization of salaries throughout an organization functioning in all the States of the Union, and this would constitute such a handicap as to compel the Federal Government to abandon the corporate form of agency or instrumentality and function directly in all fields.

To tax the salary is to tax the right of the Home Owners' Loan Corporation to employ the person, and is to levy upon the right of the person to work for the Corporation and receive the salary.

Income is to be distinguished from property. The income tax is not a tax of money in hand but is a tax on the right to receive the money.

The question here is one of power—not economics.

Congress has not consented to a state income tax, and such consent will not be implied.

The immunity exists unless Congress expressly consents to a tax.

The immunity need never be carried into express stipulation for this could add nothing to its force. *Evans* v. *Gore, supra.*

The immunity from taxation rests upon an entire absence of the power to tax. It is analogous to immunity from suit, *Helvering* v. *Gerhardt, supra,* footnote 1; *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 234, 235.

A statute under which waiver of sovereign immunity is claimed must be strictly construed. Suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued.

The immunity of federal instrumentalities from suit is less readily implied than immunity from taxation.

The rule as to taxation is absolute in form and stricter in substance.

Although it became the practice after the Civil War for Congress to insert in appropriate acts the express exemption, the immunity, without that, is clear.

The immunity of federal instrumentalities rests on a different basis from that of state instrumentalities. It is more extensive. *Helvering* v. *Gerhardt, supra.*

In *James* v. *Dravo Contracting Co., supra,* the Court pointed out that Congress might enlarge the immunity to include independent contractors if deemed necessary in order to protect the performance of the functions of the National Government.

A State is without power to tax persons, instrumentalities, or agencies engaged in exercising a power granted by the Constitution to the Federal Government, but the Federal Government can exercise its delegated powers of taxation equally against all men so long as it does not actually interfere with traditional governmental functions of the State. Cf. *McCulloch* v. *Maryland, supra; Helvering* v. *Therrell,* 303 U. S. 218; *United States* v. *California,* 297 U. S. 180.

The claim to immunity of the employees of a federal instrumentality rests on a different basis from that of an independent contractor engaged on the work of such an instrumentality. *James* v. *Dravo Contracting Co., supra; Rogers* v. *Graves, supra; Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514.

The State of New York has exempted respondent's salary from taxation by the state tax law.

Solicitor General Jackson, with whom *Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Warner W. Gardner* were on the brief, for the United States, as *amicus curiae,* by leave of Court.

The New York statute exempts "compensation received from the United States of officials or employees thereof." The relator is exempted under this provision; the question is one of state law.

The Federal Government can exercise only its delegated powers, and if the activity is constitutional it must by definition be governmental. *McCulloch* v. *Maryland,* 4 Wheat. 316, 432, 435–436; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158–159; *South Carolina* v. *United States,* 199 U. S. 437, 451–452; *Helvering* v. *Therrell,* 303 U. S. 218, 223; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–413, 416.

Stock of the Home Owners' Loan Corporation is wholly owned by the United States and its functions are those of the Government alone. Since there is and can be no challenge to its constitutionality in these proceedings, its activities must be taken to be purely governmental and in all respects those of the United States.

There is no constitutional immunity from a tax such as this.

The Court has four times held an officer of a State or the Federal Government exempt from taxation by the other; it has never held an employee to be exempt.

Collector v. *Day,* 11 Wall. 113, was erroneous at the time it was decided. It ignored that, with knowledge of tax-immunity problems, the Constitution provided no relevant limitation upon the federal taxing powers. It reversed the reasoning of the prior decision of this Court holding state taxes invalid solely because of the supremacy clause. It ignored Chief Justice Marshall's insistence that the representation of the States in Congress made unnecessary a constitutional protection. And it opened wide fields for unnecessary and unfair tax exemptions, which the Court has since been required steadily to narrow.

Collector v. *Day* can not be reconciled with the subsequent decisions of the Court. *Helvering* v. *Gerhardt,* 304 U. S. 405; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Peck & Co.* v. *Lowe,* 247 U. S. 165.

There is no practical justification for the immunity. The government officer or employee receives all the benefits of organized government and should pay his share of its costs. The tax contains no threat to the operations of Government. It is not certain that the government salary will be taxed at all if included in gross income. The exemption privilege operates in a variable and discriminatory manner. Few, if any, persons considering government work would have their decisions shaped by immunity or liability to income tax. Even if the exemption were to be reflected in the public treasury, there is doubt that such a bounty should be offered by one government to another. The requirement that the tax be non-discriminatory eliminates any danger of interference with government operations.

Each of the three reasons advanced or suggested by the Court for the decision in *Collector* v. *Day* has subsequently been rejected: (1) The power to tax can no longer be thought to involve the power to destroy. In

half a hundred cases the Court has sustained taxes which would be capable of destruction if pressed to discriminatory or oppressive limits, and the Court has expressly decided that the States could tax federal activities which they could not regulate or forbid. *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530; *New Brunswick* v. *United States,* 276 U. S. 547. (2) A non-discriminatory net income tax can no longer be considered to be an interference with the governmental functions in which the officer or employee is engaged. (3) Finally, after the decision in *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308 and *Hale* v. *State Board,* 302 U. S. 95, the tax upon net income can no longer be thought to be a tax on the source of the income.

The fear that the economic burden of the tax might be passed on to the Government no longer can be accepted as a ground for extending immunity from such a tax. *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376; *Helvering* v. *Gerhardt,* 304 U. S. 405, 418–419, 420–421.

The reasons announced by the Court for denying a claim of immunity in the cases just cited are fully applicable to the case of a Government officer.

Foreign federations with similar problems have first adopted and then have rejected the rule of *Collector* v. *Day.*

An intention on the part of Congress to exempt the salary from such taxation is not to be implied from its silence.

In forty-odd cases the States have been permitted to tax private persons who dealt with the Government. In no case has the silence of Congress been thought to imply a desire that there be exemption; the decisions of immunity have been pitched on the Constitution alone. In many opinions the Court has expressly relied upon

the failure of Congress to provide exemption as a reason why the tax should be sustained. And certainly if the gross receipts tax on the government contractor, sustained in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, was not to be thought condemned by the silence of Congress, a tax so remote from the operations of government as an income tax upon the salaries paid officers and employees is not to be thought forbidden by an implication derived from the silence of Congress.

The possible argument that Congress by its silence has accepted the rule of immunity announced in *Collector* v. *Day*, 11 Wall. 113, as applied to federal officers and employees, can not be allowed.

By leave of Court, *Messrs. Roy McKittrick,* Attorney General of Missouri, and *Edward H. Miller,* Assistant Attorney General, filed a brief on behalf of that State, as *amicus curiae,* in support of petitioners.

MR. JUSTICE STONE delivered the opinion of the Court.

We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the federal government.

Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of $2,400. In his income tax return for that year he included his salary as subject to the New York state income tax imposed by Art. 16 of the Tax Law of New York (Consol. Laws, c. 60). Subdivision 2f of § 359, since repealed, exempted from the tax "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States. . . ." Petitioners,

New York State Tax Commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was constitutionally exempt from state taxation because the Home Owners' Loan Corporation is an instrumentality of the United States Government and that he, during the taxable year, was an employee of the federal government engaged in the performance of a governmental function.

On review by certiorari the Board's action was set aside by the Appellate Division of the Supreme Court of New York, 253 App. Div. 91; 1 N. Y. S. 2d 195, whose order was affirmed by the Court of Appeals. 278 N. Y. 691; 16 N. E. 2d 404. Both courts held respondent's salary was free from tax on the authority of *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, which sustained the claim that New York could not constitutionally tax the salary of an employee of the Panama Rail Road Company, a wholly-owned corporate instrumentality of the United States. We granted certiorari, 305 U. S. 592, the constitutional question presented by the record being of public importance.

The Home Owners' Loan Corporation was created pursuant to § 4 (a) of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. § 1461 *et seq.,* which was enacted to provide emergency relief to home owners, particularly to assist them with respect to home mortgage indebtedness. The corporation, which is authorized to lend money to home owners on mortgages and to refinance home mortgage loans within the purview of the Act, is declared by § 4 (a) to be an instrumentality of the United States. Its shares of stock are wholly government-owned. § 4 (b). Its funds are deposited in the Treasury of the United States, and the compensation of its employees is paid by drafts upon the Treasury.

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. Cf. *Kay* v. *United States,* 303 U. S. 1. As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. *McCulloch* v. *Maryland,* 4 Wheat. 316, 432; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158–159; *South Carolina* v. *United States,* 199 U. S. 437, 451–452; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–415. And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. See *McCulloch* v. *Maryland, supra,* 421–422; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 208; *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *New York ex rel. Rogers* v. *Graves, supra.*

The single question with which we are now concerned is whether the tax laid by the state upon the salary of respondent, employed by a corporate instrumentality of the federal government, imposes an unconstitutional burden upon that government. The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the govern-

mental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning, *McCulloch* v. *Maryland, supra,* 435–436, and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. *Helvering* v. *Gerhardt, supra,* 412–413, 416.

So far as now relevant, those differences have been thought to be traceable to the fact that the federal government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. See *Van Allen* v. *The Assessors,* 3 Wall. 573, 583, 585; *Bank* v. *Supervisors,* 7 Wall. 26, 30, 31; *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 588, 590; *People* v. *Weaver,* 100 U. S. 539, 543; *Mercantile Bank* v. *New York,* 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 668; *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 581; *Oklahoma* v. *Barnsdall Refineries, Inc.,* 296 U. S. 521, 525–526; *Baltimore National Bank* v. *State Tax Comm'n,* 297 U. S. 209, 211–212; *British-American Oil Co.* v. *Board,* 299 U. S. 159; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 161; *Helvering* v. *Gerhardt, supra,* 411, 412, 417; cf. *United States* v. *Bekins,* 304 U. S. 27, 52. Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the con-

stitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.

Congress has declared in § 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, "including its franchise, its capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the Congressional intention is not to be gathered from the statute by implication. Cf. *Baltimore National Bank* v. *State Tax Comm'n, supra.*

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise.[1] But

[1] The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Minnesota Rate Cases,* 230 U. S. 352, 399–400; *Kelly* v. *Washington,* 302 U. S. 1, 14; *South Carolina Highway Dept.* v. *Barnwell Brothers,* 303 U. S. 177, 184–185; *Milk Control Board* v. *Eisenberg Farm Products, ante,* p. 346. As to the implications from Congressional silence in the field of state taxation of interstate commerce and its instrumentalities, see *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434.

there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313, 314; *Hale* v. *State Board*, 302 U. S. 95, 108; *Helver-*

ing v. *Gerhardt, supra;* cf. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123; *James* v. *Dravo Contracting Co., supra,* 149; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

In the four cases in which this Court has held that the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other, it was assumed, without discussion, that the immunity of a government or its instrumentality extends to the salaries of its officers and employees.[2] This assumption made with respect to the salary of a governmental officer

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[2] In *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, a Pennsylvania tax, nominally laid upon the office of the captain of a federal revenue cutter, but roughly measured by the salary paid to the officer, was held invalid. The Court seems to have rested its decision in part on the ground that a tax on the emoluments of his office was the equivalent of a tax upon an activity of the national government, and in part on the ground that it was an infringement of the implied superior power of Congress to fix the compensation of government employees without diminution by state taxation.

In *Collector* v. *Day,* 11 Wall. 113, this Court held that the salary of a state probate judge was constitutionally immune from federal income tax on the grounds that the salary of an officer of a state is exempt from federal taxation if the function he performs as an officer is exempt, citing *Dobbins* v. *Commissioners, supra,* and that there was an implied constitutional restriction upon the power of the national government to tax a state in the exercise of those functions which were essential to the maintenance of state governments as they were organized at the time when the Constitution was adopted. The possibility that a non-discriminatory tax upon the income of a state officer did not involve any substantial interference

in *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, and in *Collector* v. *Day,* 11 Wall. 113, was later extended to confer immunity on income derived by a lessee from lands leased to him by a government in the performance of a governmental function, *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, and cases cited, although the claim of a like exemption from tax on the income of a contractor engaged in carrying out a governmental project was rejected both in the case of a contractor with a state, *Metcalf & Eddy* v.

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with the functioning of the state government was not discussed either in this or the *Dobbins* case.

In *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, the question was whether the salary of the general counsel of the Panama Rail Road Company was exempt from state income tax because the railroad company was an instrumentality of the federal government. The sole question raised by the taxing state was whether the railroad company was a government instrumentality. The Court, having found that the railroad company was such an instrumentality, disposed of the matter of tax exemption of the salary of its employees by declaring: "The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." *New York ex rel. Rogers* v. *Graves, supra,* 408.

In *Brush* v. *Commissioner,* 300 U. S. 352, the applicable treasury regulation upon which the government relied exempted from federal income tax the compensation of "state officers and employees" for "services rendered in connection with the exercise of an essential governmental function of the State." The Court held that the maintenance of the public water system of New York City was an essential governmental function, and in determining whether the salary of the engineer in charge of that project was subject to federal income tax the Court declared, citing *New York ex rel. Rogers* v. *Graves, supra,* 408; "The answer depends upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so, its operations are immune from federal taxation and, as a necessary corollary, 'fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." *Brush* v. *Commissioner, supra,* 360.

Mitchell, supra, and of a contractor with the national government, *James* v. *Dravo Contracting Co., supra.*

The ultimate repudiation in *Helvering* v. *Mountain Producers Corp., supra,* of the doctrine that a tax on the income of a lessee derived from a lease of government owned or controlled lands is a forbidden interference with the activities of the government concerned led to the re-examination by this Court, in the *Gerhardt* case, of the theory underlying the asserted immunity from taxation by one government of salaries of employees of the other. It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. See *Metcalf & Eddy* v. *Mitchell, supra,* 523–524; *James* v. *Dravo Contracting Co., supra,* 156–158. It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private,[3] but to

[3] The fact that the expenses of the one government might be lessened if all those who deal with it were exempt from taxation by the other was thought not to be an adequate basis for tax immunity in *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279; *Burnet* v. *Jergins Trust,* 288 U. S. 508; *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376.

prevent undue interference with the one government by imposing on it the tax burdens of the other.

In applying these controlling principles in the *Gerhardt* case the Court held that the salaries of employees of the New York Port Authority, a state instrumentality created by New York and New Jersey, were not immune from federal income tax, even though the Authority be regarded as not subject to federal taxation. It was said that the taxpayers enjoyed the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the states creating it, only so far as the burden of the tax was economically passed on to the employer; that a non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials.[4] The Court concluded

[4] That the economic burden of a tax on salaries is passed on to the employer or that employees will accept a lower government salary because of its tax immunity, are formulas which have not won acceptance by economists and cannot be judicially assumed. As to the "passing on" of the economic burden of the tax, see Seligman, Income Tax, VII Encyclopedia of Social Sciences, 626–638; Plehn, Public Finance (5th ed.), p. 320; Buehler, Public Finance, p. 240; Lutz, Public Finance (2d ed.), p. 336, and see *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 581, footnote 1. As to preference for government employment because the salary is tax exempt, see Dickinson, Compensating Industrial Effort (1937), pp. 7–8; Douglas, The Reality of Non-Commercial Incentives in Industrial Life, c. V of The Trend of Economics (1924); Vol. I, Fetter, Economic Principles (1915), p. 203.

that the claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the national government in order to secure to the state a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the *Gerhardt* case that in terms of constitutional tax immunity a federal income tax on the salary of an employee is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employee of a federal instrumentality. As already indicated, such differences as there may be between the implied tax immunity of a state and the corresponding immunity of the national government and its instrumentalities may be traced to the fact that the national government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the national government to claim immunity from state taxation of all instrumentalities which it may constitutionally create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from state taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity cannot affect the question with which we are now concerned. The burden on government of a non-discriminatory income tax applied to the salary of the employee of a government or its instrumentality is the same, whether a state or national government is concerned. The determination in the *Gerhardt* case that the federal income tax imposed on the employees of the Port Authority was not a burden on the Port Authority made it unnecessary to consider whether the Authority itself was immune from federal taxation; the claimed immunity failed because even if the Port Authority were

itself immune from federal income tax, the tax upon the income of its employees cast upon it no unconstitutional burden.

Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of federal income taxation of salaries of state employees, stated at length in the *Gerhardt* case, are of equal force when immunity is claimed from state income tax on salaries paid by the national government or its agencies. In this respect we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a state or the national government, or of its instrumentalities. In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector* v. *Day, supra,* and in *New York ex rel. Rogers* v. *Graves, supra,* is contrary to the reasoning and to the conclusions reached in the *Gerhardt* case and in *Metcalf & Eddy* v. *Mitchell, supra; Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279; *James* v. *Dravo Contracting Co., supra; Helvering* v. *Mountain Producers Corp., supra; McLoughlin* v. *Commissioner,* 303 U. S. 218. In their light the assumption can no longer be made. *Collector* v. *Day, supra,* and *New York ex rel. Rogers* v. *Graves, supra,* are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

Reversed.

MR. CHIEF JUSTICE HUGHES concurs in the result.

MR. JUSTICE FRANKFURTER, concurring:

I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions.[1] But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society.

[1] The state of the docket of the High Court of Australia and that of the Supreme Court of Canada still permits them to continue the classic practice of *seriatim* opinions.

A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before, barring only duties affecting exports, imports, and on tonnage.[2] Congress, on the other hand, to lay taxes in order "to pay the Debts and provide for the common Defense and general Welfare of the United States," Art. I, § 8, can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *McCulloch* v. *Maryland*, 4 Wheat. 316, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated

[2] Article 1, § 10, U. S. Constitution.

to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch* v. *Maryland.* Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy." *Id.,* at p. 431. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch* v. *Maryland.*[3] The seductive *cliché* that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent,[4] the force of which gathered rather than lost strength with time. *Collector* v. *Day,* 11 Wall. 113, 128.

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[3] *Weston* v. *City Council of Charleston,* 2 Pet. 449, 472–73.

[4] "I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. . . . In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? . . . How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences." (11 Wall. 113, 128–29.)

All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called "pernicious abstractions." The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism,[5] and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent.[6] In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity.[7]

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[5] *E. g.*, *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393; *N. Y. ex rel. Rogers* v. *Graves*, 299 U. S. 401; *Brush* v. *Commissioner*, 300 U. S. 352.

[6] *E. g.*, Mr. Justice Brandeis, dissenting, in *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 615; Mr. Justice Holmes, dissenting, in *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 222; Mr. Justice Stone, dissenting, in *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 580; Mr. Justice Roberts, dissenting, in *Brush* v. *Commissioner*, 300 U. S. 352, 374. See, also, Mr. Justice Black, concurring, in *Helvering* v. *Gerhardt*, 304 U. S. 405, 424.

[7] *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *D'Emden* v. *Pedder*, 1 C. L. R. 91.

Both the Supreme Court of Canada and the High Court of Australia on fuller consideration—and for present purposes the British North America Act, 30 & 31 Vict., c. 3, and the Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12, raise the same legal issues as does our Constitution [8]—have completely rejected the doctrine of intergovernmental immunity.[9] In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.[10]

The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we

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[8] Especially is this true of the Australian Constitution. One of its framers, who afterwards became one of the most distinguished of Australian judges, Mr. Justice Higgins, characterized it as having followed our Constitution with "pedantic imitation." *Australasian Temperance & G. M. Life Assurance Society* v. *Howe,* 31 C. L. R. 290, 330.

[9] *Abbott* v. *City of St. John,* 40 Can. Sup. Ct. 597; *Caron* v. *The King,* (1924) A. C. 999; *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.,* 28 C. L. R. 129; *West* v. *Commissioner of Taxation,* 56 C. L. R. 657.

[10] *E. g., James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376; *Helvering* v. *Gerhardt,* 304 U. S. 405.

have said about it.[11] Neither *Dobbins* v. *Commissioners*, 16 Pet. 435, and its offspring, nor *Collector* v. *Day*, *supra*, and its, can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an interdependent doctrine, both should be, as I assume them to be, overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day.

MR. JUSTICE BUTLER, dissenting:

MR. JUSTICE MCREYNOLDS and I are of opinion that the Home Owners' Loan Corporation, being an instrumentality of the United States heretofore deemed immune from state taxation, "it necessarily results," as held in *New York ex rel. Rogers* v. *Graves* (1937) 299 U. S. 401, "that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune"; and that the judgment of the state court, unquestionably required by that decision, should be affirmed.

From the decision just announced, it is clear that the Court has overruled *Dobbins* v. *Commissioners of Erie County* (1842) 16 Pet. 435; *Collector* v. *Day* (1871) 11 Wall. 113; *New York ex rel. Rogers* v. *Graves*, *supra*, and *Brush* v. *Commissioner* (1937) 300 U. S. 352. Thus now it appears that the United States has always had power to tax salaries of state officers and employees and that

[11] Compare Taney, C. J., in *Passenger Cases*, 7 How. 283, 470: "I . . . am quite willing that it be regarded as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

similarly free have been the States to tax salaries of officers and employees of the United States. The compensation for past as well as for future service to be taxed and the rates prescribed in the exertion of the newly disclosed power depend on legislative discretion not subject to judicial revision. Futile indeed are the vague intimations that this Court may protect against excessive or destructive taxation. Where the power to tax exists, legislatures may exert it to destroy, to discourage, to protect or exclusively for the purpose of raising revenue. See e. g. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *McCray* v. *United States,* 195 U. S. 27, 53 *et seq.; Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44 *et seq.; Cincinnati Soap Co.* v. *United States,* 301 U. S. 308.

Appraisal of lurking or apparent implications of the Court's opinion can serve no useful end for, should occasion arise, they may be ignored or given direction differing from that at first seemingly intended. But safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired.

PACIFIC EMPLOYERS INSURANCE CO. *v.* INDUSTRIAL ACCIDENT COMM'N ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 158. Argued December 12, 1938.—Decided March 27, 1939.

1. A State is not bound, apart from the compulsion of the full faith and credit clause, to enforce the laws of another State; nor by its own statute may it determine the choice of law to be applied in the other. P. 500.
2. An employee of a Massachusetts corporation, resident in Massachusetts and regularly employed in that State under a contract of employment entered into there, was injured in the course of his employment while temporarily in California. The Massachusetts workmen's compensation statute purported to give an exclusive

remedy, even though the injury was suffered outside of the State. *Held,* the courts of California were not bound by the full faith and credit clause of the Federal Constitution to apply, contrary to the policy of their State, the Massachusetts statute, or to recognize it as a defense to a claim of the employee under the workmen's compensation statute of California, which, because the injury was suffered in the course of employment there, also purported to be applicable and to give an exclusive remedy. *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, distinguished. P. 501.

That the application of the Massachusetts statute in this case would be obnoxious to the policy of California sufficiently appears: Not only does the California statute conflict with the Massachusetts statute in respect of its application to employees injured in California, but it also expressly provides that "No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this Act"; and further, the supreme court of California in its opinion in this case has declared it to be the policy of the State, as expressed in its constitution and compensation Act, to apply its own provisions for compensation, to the exclusion of all others, and holds that "It would be obnoxious to that policy to deny persons who have been injured in this State the right to apply for compensation when to do so might require physicians and hospitals to go to another State to collect charges for medical care and treatment given to such persons."

3. The nature of the federal union of States, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as a means for compelling a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate. P. 501.
4. The full faith and credit clause does not require a State to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another State, even though that statute is of controlling force in the courts of the State of its enactment with respect to the same persons and events,—at least in the absence of action by Congress prescribing the extra-state effect to be given state statutes. P. 502.
5. This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one State, that of the forum, by the statute of another State. P. 502.

10 Cal. 2d 567; 75 P. 2d 1058, affirmed.

CERTIORARI, 305 U. S. 563, to review the affirmance of a judgment denying a petition of the insurer of an employer to set aside an award of compensation made to an employee by the state commission.

Mr. W. N. Mullen, with whom *Mr. George C. Faulkner* was on the brief, for petitioner.

The award under the California Workmen's Compensation Act and the refusal to recognize the Massachusetts statute as a defense in the California proceedings, is contrary to the full faith and credit clause.

The courts of one State must give full faith and credit to a statute of a second State which is set up as a defense to an action brought in the first State. *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145; *Modern Woodmen* v. *Mixer,* 267 U. S. 544; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389; *Supreme Council* v. *Green,* 237 U. S. 531; *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542; *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55. The *Bradford Light* case controls the present case.

Where the statute of a foreign state constitutes a substantive defense to an action, a conflict between such statute and the statute of the forum can not be resolved by weighing the governmental interests of each jurisdiction. *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532.

There is no adequate basis for the conclusion of the California court that to deny recovery would be obnoxious to the public policy of that State.

The California court erred in stating that because of public policy it had a greater governmental interest than Massachusetts.

The imposition of a lien for medical services presupposes the right and existence of jurisdiction to make an award to the employee. It is illogical to say that the jurisdiction of a tribunal, in any case, can be determined

by a fact which can have no existence until after the determination or creation of the jurisdiction of said tribunal.

The California court also has ignored the fact that the physicians and hospitals who rendered services to the employee in that State would not be without remedy in California if the Commission were held to have no jurisdiction to make an award herein. They would have a cause of action based in contract which could be prosecuted in California courts. It would be unnecessary for them to go to a foreign jurisdiction for recovery.

Moreover, had the compensation claim been brought in Massachusetts, it would have been very little inconvenience for the hospitals and physicians to present their claims in that jurisdiction.

The decision of the California court is not sound economically. It is economically important that an employer be able to look to the law of the State of his residence, where his business is principally conducted, where the contract of employment is made, and where it is to be principally performed, and do so with the assurance that such law will be given full faith and credit by other States. Otherwise, he must carry workmen's compensation insurance in every State in which, or through which, any employee may travel. This would materially increase the amount of insurance premiums such an employer would have to pay. An inevitable increase in producers' and consumers' costs would result. These considerations give great weight to the interest of Massachusetts in the present case. 23 Cal. Law Rev. 381, 389; 46 Harv. L. Rev. 291, 297.

Mr. Frank J. Creede for Kenneth Tator, respondent.
Mr. Everett A. Corten for the Industrial Accident Commission of California, respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question is whether the full faith and credit which the Constitution requires to be given to a Massachusetts workmen's compensation statute precludes California from applying its own workmen's compensation act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.

Petitioner, an insurance carrier, under the California Workmen's Compensation, Insurance and Safety Act, for the Pacific Coast branch of the employer, Dewey & Almy Chemical Company, a Massachusetts corporation, filed its petition in the California District Court of Appeal to set aside an award of compensation to an employee by the California Industrial Accident Commission. The grounds of the petition were, among others, that the employee, because he was regularly employed at the head office of the corporation in Massachusetts and was temporarily in California on the business of the employer when injured there, was subject to the workmen's compensation law of Massachusetts, and that the California Commission, in applying the California Act and in refusing to recognize the Massachusetts statute as a defense, had denied to the latter the full faith and credit to which it was entitled under Article IV, § 1 of the Constitution. The order of the District Court of Appeal denying the petition was affirmed by the Supreme Court of California. 10 Cal. 2d 567; 75 P. 2d 1058. We granted certiorari, 305 U. S. 563, the question presented being of public importance.

The injured employee, a resident of Massachusetts, was regularly employed there under written contract in the laboratories of the Dewey & Almy Chemical Company as a chemical engineer and research chemist. In

September, 1935, in the usual course of his employment he was sent by his employer to its branch factory in California, to act temporarily as technical adviser in the effort to improve the quality of one of the employer's products manufactured there. Upon completion of the assignment he expected to return to the employer's Massachusetts place of business, and while in California he remained subject to the general direction and control of the employer's Massachusetts office, from which his compensation was paid.

He instituted the present proceeding before the California Commission for the award of compensation under the California Act for injuries received in the course of his employment in that state, naming petitioner as insurance carrier under that Act; the Hartford Accident & Indemnity Company, as insurer under the Massachusetts Act, was made a party. The California Commission directed petitioner to pay the compensation prescribed by the California Act, including the amounts of lien claims filed in the proceeding for medical, hospital and nursing services and certain further amounts necessary for such services in the future.

By the applicable Massachusetts statute, §§ 24, 26, c. 152, Mass. Gen. Laws (Ter. Ed. 1932), an employee of a person insured under the Act, as was the employer in this case, is deemed to waive his "right of action at common law or under the law of any other jurisdiction" to recover for personal injuries unless he shall have given appropriate notice to the employer in writing that he elects to retain such rights. Section 26 directs that without the notice his right to recover be restricted to the compensation provided by the Act for injuries received in the course of his employment, "whether within or without the commonwealth." See *McLaughlin's Case*, 274 Mass. 217; 174 N. E. 338; *Migues' Case*, 281 Mass. 373; 183 N. E. 847.

Article XX, § 21 of the California Constitution vests the legislature with plenary power "to create and enforce a complete system of workmen's compensation," including "adequate provisions for the comfort, health and safety and general welfare" of employees injured in the course of their employment, and their dependents, and to make "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury." Sections 6, 9 and 29 of the California Workmen's Compensation, Insurance and Safety Act, Cal. Gen. Laws (Deering 1931) Act 4749, provide for compensation from insurance procured by the employer, in prescribed amounts, for injuries received by his employees in the course of their employment without regard to negligence and for the costs of medical attendance occasioned by the injuries. Section 27 (a) provides that "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this act." And § 58 provides that the commission shall have jurisdiction over claims for compensation for injuries suffered outside the state when the employee's contract of hire was entered into within the state. See *Quong Ham Wah Co.* v. *Industrial Accident Comm'n,* 184 Cal. 26; 192 P. 1021. Both statutes are compensation acts, substituted for the common law remedy for negligence. The California Act is compulsory. § 6 (a). The Massachusetts Act is similarly effective unless the employee gives notice not to be bound by it, which in this case he did not do. § 24.

Petitioner, which as insurance carrier has assumed the liability of the employer under the California Act, relies on the provisions of the Massachusetts Act that the compensation shall be that prescribed for injuries suffered in the course of the employment, whether within or without the state. It insists that since the contract of employment was entered into in Massachusetts and the

employee consented to be bound by the Massachusetts Act, that, and not the California statute, fixes the employee's right to compensation whether the injuries were received within or without the state, and that the Massachusetts statute is constitutionally entitled to full faith and credit in the courts of California.

We may assume that these provisions are controlling upon the parties in Massachusetts, and that since they are applicable to a Massachusetts contract of employment between a Massachusetts employer and employee, they do not infringe due process. *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 156, *et seq.* Similarly the constitutionality of the provisions of the California statute awarding compensation for injuries to an employee occurring within its borders, and for injuries as well occurring elsewhere, when the contract of employment was entered into within the state, is not open to question. *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532; *New York Central R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

While in the circumstances now presented, either state, if its system for administering workmen's compensation permitted, would be free to adopt and enforce the remedy provided by the statute of the other, here each has provided for itself an exclusive remedy for a liability which it was constitutionally authorized to impose. But neither is bound, apart from the compulsion of the full faith and credit clause, to enforce the laws of the other, *Milwaukee County* v. *White Co.,* 296 U. S. 268, 272; and the law of neither can by its own force determine the choice of law to be applied in the other. Cf. *Ohio* v. *Chattanooga Boiler & Tank Co.,* 289 U. S. 439. Petitioner, pointing to the conflict between the provisions of the two statutes, insists that the full faith and credit clause requires recognition of the Massachusetts statute as providing the ex-

clusive remedy and as a defense to any proceeding for the award of compensation under the California Act. The Supreme Court of California has recognized the conflict and resolved it by holding that the full faith and credit clause does not deny to the courts of California the right to apply its own statute awarding compensation for an injury suffered by an employee within the state.

To the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its policy to provide compensation for employees injured in their employment within the state. It must withhold the remedy given by its own statute to its residents by way of compensation for medical, hospital and nursing services rendered to the injured employee, and it must remit him to Massachusetts to secure the administrative remedy which that state has provided. We cannot say that the full faith and credit clause goes so far.

While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. As was pointed out in *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* 547: "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." And in cases like the present it would create an impasse which

would often leave the employee remediless. Full faith and credit would deny to California the right to apply its own remedy, and its administrative machinery may well not be adapted to giving the remedy afforded by Massachusetts. Similarly, the full faith and credit demanded for the California Act would deny to Massachusetts the right to apply its own remedy, and its Department of Industrial Accidents may well be without statutory authority to afford the remedy provided by the California statute.

It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy. See *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265; *Huntington* v. *Attrill,* 146 U. S. 657; *Finney* v. *Guy,* 189 U. S. 335; *Milwaukee County* v. *White Co., supra,* 273 *et seq.;* see also *Clarke* v. *Clarke,* 178 U. S. 186; *Olmsted* v. *Olmsted,* 216 U. S. 386; *Hood* v. *McGehee,* 237 U. S. 611; cf. *Gasquet* v. *Fenner,* 247 U. S. 16. And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.

This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state. See *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* 547. But there would seem to be little room for the exercise of that function when the statute of the forum is the

expression of domestic policy, in terms declared to be exclusive in its application to persons and events within the state. Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power. Considerations of less weight led to the conclusion, in *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* that the full faith and credit clause did not require California to give effect to the Alaska Compensation Act in preference to its own. There this Court sustained the award by California of the compensation provided by its own statute for employees where the contract of employment was made within the state, although the injury occurred in Alaska, whose statute also provided compensation for the injury. Decision was rested explicitly upon the grounds that the full faith and credit exacted for the statute of one state does not necessarily preclude another state from enforcing in its own courts its own conflicting statute having no extra-territorial operation forbidden by the Fourteenth Amendment, and that no persuasive reason was shown for denying that right.

Bradford Electric Light Co. v. *Clapper, supra,* on which petitioner relies, fully recognized this limitation on the full faith and credit clause. It was there held that a federal court in New Hampshire, in a suit brought against a Vermont employer by his Vermont employee to recover for an injury suffered in the course of his employment while temporarily in New Hampshire, was bound to apply

the Vermont Compensation Act rather than the provision of the New Hampshire Compensation Act which permitted the employee, at his election, to enforce his common law remedy. But the Court was careful to point out that there was nothing in the New Hampshire statute, the decisions of its courts, or in the circumstances of the case, to suggest that reliance on the provisions of the Vermont statute, as a defense to the New Hampshire suit, was obnoxious to the policy of New Hampshire. The *Clapper* case cannot be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment while temporarily in another state, will be given full faith and credit in the latter when not obnoxious to its policy. See *Bradford Electric Light Co.* v. *Clapper, supra,* 161.

Here, California legislation not only conflicts with that of Massachusetts providing compensation for the Massachusetts employee if injured within the state of California, but it expressly provides, for the guidance of its own commission and courts, that "No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this Act." The Supreme Court of California has declared in its opinion in this case that it is the policy of the state, as expressed in its Constitution and Compensation Act, to apply its own provisions for compensation, to the exclusion of all others, and that "It would be obnoxious to that policy to deny persons who have been injured in this state the right to apply for compensation when to do so might require physicians and hospitals to go to another state to collect charges for medical care and treatment given to such persons."

Full faith and credit does not here enable one state to legislate for the other or to project its laws across state

lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

BONET, TREASURER OF PUERTO RICO, *v.* YABUCOA SUGAR CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 498. Argued March 7, 1939.—Decided March 27, 1939.

1. A suit against the Treasurer of Puerto Rico to enforce a tax refund can not be maintained unless authorized by Puerto Rican law. Puerto Rico can not be sued without its consent. P. 506.
2. The legislature of Puerto Rico is not obliged to provide a judicial remedy for tax refunds. *Id.*
3. Under the laws of Puerto Rico, as construed by the Island courts, suit can not be maintained against the territorial Treasurer to collect from him an amount voluntarily paid as an income tax which the Treasurer has declined to refund. P. 507.
4. This Court follows the construction of the local tax laws adopted by the courts of Puerto Rico unless clearly erroneous. P. 509.

98 F. 2d 398, reversed.

CERTIORARI, *post,* p. 622, to review a judgment which reversed a decision of the Supreme Court of Puerto Rico denying the jurisdiction of the local courts over an action against the territorial Treasurer to recover money voluntarily paid as a tax. See 50 D. P. R. 962; 51 *id.* 135.

Mr. William Cattron Rigby, with whom *Messrs. B. Fernandez Garcia,* Attorney General of Puerto Rico, and *Nathan R. Margold* were on the brief, for petitioner.

Mr. Earle T. Fiddler, with whom *Mr. Andrew Kirkpatrick* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondent sued the Treasurer of Puerto Rico in a local district court for recovery of 1927 income taxes paid under the laws of the Island. By construction of the local Puerto Rican statutes permitting suits for refunds, the local district court found that no right had been granted to sue at law for taxes voluntarily paid. The bill of complaint was then dismissed for lack of jurisdiction, because it disclosed that the tax in question had been paid voluntarily and without protest. The Supreme Court of Puerto Rico affirmed, but was reversed by the United States Circuit Court of Appeals.[1]

As conceded by respondent, this suit cannot be maintained unless authorized by a Puerto Rican law, because Puerto Rico cannot be sued without its consent.[2] It is also conceded that the Puerto Rican legislature is not obligated to provide a judicial remedy for tax refunds.[3] Respondent's contentions here are that the governing statutes of the Island do authorize the present suit "either by express language or by necessary implication," and that the Puerto Rican courts erroneously construed the local statutes.

Section 75 of the controlling Income Tax Act of Puerto Rico, approved August 6, 1925,[4] authorizes the Treasurer "to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, . . . and all taxes that appear to be unjustly assessed or excessive in amount, or in

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[1] 98 F. 2d 398. The opinion of the Supreme Court of Puerto Rico, and its opinion on rehearing, have as yet been reported only in Spanish. 50 D. P. R. 962, 51 D. P. R. 135.

[2] See *Porto Rico* v. *Rosaly*, 227 U. S. 270, 274; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 262.

[3] Cf., *Dismuke* v. *United States*, 297 U. S. 167, 171, 172.

[4] Laws of Puerto Rico 1925, p. 400, 536.

any manner wrongfully collected," and requires him to "report to The Legislature of Porto Rico at the beginning of each regular session . . . all transactions under this section."

The courts of Puerto Rico construed § 75 to mean that the Treasurer's refusal to refund taxes not paid under protest is final; that the local statutes grant the courts no jurisdiction to review this refusal; and that after the Treasurer's report to the legislature, a voluntary taxpayer's complaint must be addressed to the legislature. Disagreeing with this construction given the statute by the courts of Puerto Rico, the Circuit Court of Appeals (one Judge dissenting) found that the 1925 Act plainly provided a resort to the courts, even in suits to recover taxes voluntarily paid without protest.

It is necessary that we examine some of the considerations which led to the Puerto Rican courts' construction of § 75 of the 1925 Act. For illustration, § 66 of the Puerto Rican Income Tax Law of 1919 [5] imposed upon the Treasurer the duty of making tax refunds (as in § 75 of the 1925 Act), but § 66 contained an express provision for "appeal to the courts" if a taxpayer's claim were denied by the Treasurer.[6] The omission of this express provision from § 75 and all other sections of the 1925

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[5] Laws, 1919, p. 612, 666.

[6] Section 66: "That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

"That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected. as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

Act was logically considered by the Puerto Rican courts to be of significance in the construction of that Act. The right of appeal to the courts contained in § 66 of the 1919 Law was first omitted from the 1921 Puerto Rican Law,[7] and this led the Supreme Court of Puerto Rico to declare in the present case that "since 1921, . . . the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated." [8]

Furthermore, four different sections of the 1925 Act (57, 60, 62 and 76 (a)) constitute a statutory plan under which a taxpayer who pays under protest is granted the right to sue in the courts for refund. Such a taxpayer can sue at law under these sections only if he has been denied relief by both the Treasurer and the Board of Review and Equalization of the Island. But these sections nowhere expressly authorize appeal from the Treasurer to the Board by one who paid taxes without protest. And § 76 (b), which the Circuit Court of Appeals interpreted as authorizing suit by a taxpayer who paid without protest, expressly prohibits suit in court "until a claim for refund or credit has been duly filed with . . . the Board of Review and Equalization *on appeal,* according to the provisions of law in that regard, and the regulations established in pursuance thereof." (Italics supplied.) Since a voluntary taxpayer is given no express right of appeal from the Treasurer to the Board by the "provisions of law in . . . regard" to such appeals, he is not expressly authorized to comply with the condition precedent to right of suit under § 76 (b). Rights denied by the statutes could not be granted by regulations.

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[7] Laws, 1921, p. 312.

[8] *Compania Agricola de Cayey, Ltd.* v. *Domenech,* 47 D. P. R. 535 (Spanish ed.), decided prior to the present case, is to the same effect.

In addition, § 76 (b) of the 1925 Act is practically identical in language with § 3226 of United States Revised Statutes governing suits for refunds of United States taxes.[9] But the legislature of Puerto Rico—while apparently using § 3226 as a model—omitted from 76 (b) the clause of § 3226 reading "suit or proceeding [for tax refund] may be maintained, whether or not such tax . . . has been paid under protest or duress." This substantial adoption of § 3226, omitting the clause authorizing suit without protest, (as well as the similar omission from the 1921 Act), could hardly represent accidental oversight, but instead indicates a deliberate legislative purpose.[10]

Congress first granted local authority to the government of Puerto Rico in 1900[11] and comprehensively revised the original plan in 1917.[12] Both enactments manifest a congressional purpose to preserve—consistently with our system of government—the then existing governmental practices. Laws and ordinances then in effect and not contrary to our laws or Constitution were continued in full force, subject to alteration by the Puerto Rican legislature or Congress. Original and appellate local courts, their jurisdiction and procedure, were preserved by Congress, and local officials were left in office.[13] And this Court has declared its unwillingness to overrule Puerto Rican tribunals upon matters of purely local concern[14] or to decide against the local understanding of a local matter, not believed by this Court to be clearly wrong;[15] and a disposition to accept the construction

[9] 43 Stat. 253, 343.

[10] Cf., *United States* v. *McClure,* 305 U. S. 472, 477–478.

[11] Act of April 12, 1900, c. 191, 31 Stat. 77.

[12] Act of March 2, 1917, c. 145, 39 Stat. 951.

[13] See, *Garzot* v. *de Rubio,* 209 U. S. 283, 302.

[14] *Nadal* v. *May,* 233 U. S. 447, 454.

[15] *Sante Fe Central Ry. Co.* v. *Friday,* 232 U. S. 694, 700.

placed by a local court upon a local statute.[16] and to sustain such a construction in the absence of clear or manifest error.[17]

Taxing acts of Puerto Rico are purely local and the traditional reluctance of this Court to overturn constructions of such local statutes by local courts is particularly applicable to interpretations of Puerto Rican statutes by Puerto Rican tribunals.[18] Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island.

The judgments of the Puerto Rican courts in this case are not unsupported by logic or reason. They embody a recognition of our constitutional division of powers between the legislative and judicial branches of government. Believing the legislature had declined to give the right to sue to a taxpayer who computed his own tax from his own records and voluntarily paid it without protest, the Puerto Rican courts properly declined to read implications into a statute which they could not fairly find there. In passing upon a previous construction of a Puerto Rican statute by the Supreme Court of Puerto Rico, this Court said, "The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the court of the Island is called on constantly to deal, and we are not prepared, as against the weight properly attributed to the local decision, to say that it is wrong." [19] So

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[16] *Phoenix Ry. Co.* v. *Landis,* 231 U. S. 578, 579.

[17] *Villanueva* v. *Villanueva,* 239 U. S. 293, 299; *Waialua Co.* v. *Christian,* 305 U. S. 91, 109; *Inter-Island Co.* v. *Hawaii,* 305 U. S. 306, 311.

[18] *Diaz* v. *Gonzalez,* 261 U. S. 102, 105, 106.

[19] *Cardova* v. *Folgueras,* 227 U. S. 375, 378, 379.

here, we cannot say the Puerto Rican courts were wrong. In failing to uphold their construction of the local statutes, the Circuit Court of Appeals was in error.

The judgment of the Court of Appeals is reversed and the complaint in the district court of Puerto Rico must stand dismissed, as ordered by that court and affirmed by the Supreme Court of Puerto Rico.

Reversed.

STATE TAX COMMISSION ET AL. *v.* VAN COTT.

CERTIORARI TO THE SUPREME COURT OF UTAH.

No. 491. Argued March 6, 7, 1939.—Decided March 27, 1939.

1. Salaries of employees or officials of federal instrumentalities are not immune under the Federal Constitution from taxation by the States. *Graves* v. *New York ex rel. O'Keefe*, *ante*, p. 466. P. 515.
2. The judgment of the Supreme Court of Utah holding the salaries of an attorney for the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation, both federal agencies, exempt from state taxation, does not rest squarely upon the exemption in the Utah income tax law of salaries received from the United States "for services rendered in connection with the exercise of an essential governmental function," but appears also to have been actuated by the doctrine that state taxation of such salaries is forbidden by the Federal Constitution. P. 513.
3. In view of the overruling of that doctrine by *Graves* v. *O'Keefe*, this Court vacates the judgment of the Supreme Court of Utah and remands the case to that court, in order that it may determine whether the salaries in question are exempted by the state statute, purely as a question of local law. P. 515.

95 Utah 43; 79 P. 2d 6, vacated.

CERTIORARI, 305 U. S. 592, to review a judgment sustaining a claim of exemption from state income taxation, on appeal from a ruling of the above-named Tax Commission.

Mr. Irwin Arnovitz, with whom *Messrs. Joseph Chez*, Attorney General of Utah, and *John D. Rice*, Deputy Attorney General, were on the brief, for petitioners.

Mr. W. Q. Van Cott, pro se.

The decision of the court below was based squarely upon the construction of the Utah taxing statute. It did not and could not reach the federal question and should not be reviewed.

The Reconstruction and Regional corporations are engaged exclusively in exercising traditional and important functions of the United States,—"essential governmental functions," if that phrase applies to any federal activities. *Brush* v. *Commissioner,* 300 U. S. 352.

Under *Dobbins* v. *Commissioners,* 16 Pet. 435, and *Rogers* v. *Graves,* 299 U. S. 401, respondent's salaries are immune from state taxation, irrespective of the state statute. Also, *McCulloch* v. *Maryland,* 4 Wheat. 316; *Helvering* v. *Gerhardt,* 304 U. S. 405.

No question as to the constitutionality of the Reconstruction or Regional Corporation is presented.

It is the present intention of Congress that the salaries of officers and employees of the United States and its instrumentalities shall be immune from taxation by the States.

By leave of Court, *Solicitor General Jackson* filed a brief on behalf of the United States, as *amicus curiae.*

Mr. Justice Black delivered the opinion of the Court.

The State of Utah's income tax law, effective in 1935, exempts all "Amounts received as compensation, salaries or wages from the United States . . . for services rendered in connection with the exercise of *an essential governmental function.*" [1] (Italics supplied.) In his return of income taxes to the State for 1935 under this law, respondent claimed "as deduction" and "as exempt"

[1] Revised Stat. of Utah, 1933, § 80–14–4, (2) (g).

salaries paid him as attorney for the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation, both federal agencies. The exemptions were denied by the Tax Commission of Utah, but the Utah Supreme Court reversed.[2] Before the Commission and in the Supreme Court of Utah, respondent asserted, first, that his salaries were exempt by the terms of the state statute itself, and, second, that they could not be taxed by the State without violating an immunity granted by the Federal Constitution. In holding respondent's income not taxable, the Supreme Court of Utah said: "We shall have to be content to follow, as we think we must, the doctrine of the Graves Case [*Rogers* v. *Graves,* 299 U. S. 401], until such time as a different rule is laid down by the courts, the Congress, or the people through amendment to the Constitution." [3] The *Graves* case applied the doctrine that the Federal Constitution prohibits the application of state income taxes to salaries derived from federal instrumentalities. We granted certiorari, in the present case, because of the importance of the principle of Constitutional immunity from state taxation which the Utah court apparently thought controlled its judgment.[4]

Respondent contends that the Utah Supreme Court's decision "was based squarely upon the construction of the Utah taxing statute which was held to omit respondent's salaries as a subject of taxation, and therefore that decision did not and could not reach the federal question and should not be reviewed." But that decision cannot be said to rest squarely upon a construction of the state statute. The Utah court stated that the question before it was whether respondent's salaries from the agencies in question were "taxable income for the purpose of the

[2] 95 Utah 43; 79 P. 2d 6.

[3] 79 P. 2d 14.

[4] 305 U. S. 592.

state income tax law," and that the answer depended upon whether these agencies exercised "essential governmental functions." But the opinion as a whole shows that the court felt constrained to conclude as it did because of the Federal Constitution and this Court's prior adjudications of Constitutional immunity. Otherwise, it is difficult to explain the court's declaration that respondent could not be taxed under the "doctrine of the *Graves* case *until such time as a different rule is laid down by the courts, the Congress or the people through amendment to the Constitution.*" (Italics supplied.) If the court were only incidentally referring to decisions of this Court in determining the meaning of the state law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question.[5] But, if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law.[6] Whatever exemptions the Supreme Court of Utah may find in the terms of this statute, its opinion in the present case only indicates that "it thought the Federal Constitution [as construed by this Court] required" it to hold respondent not taxable.[7]

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[5] *Miller's Executors* v. *Swann,* 150 U. S. 132, 136; *Interstate Railway Co.* v. *Massachusetts,* 207 U. S. 79, 84; *Louisville & Nashville R. Co.* v. *Western Union Telegraph Co.,* 237 U. S. 300, 302; cf. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 507.

[6] *Abie State Bank* v. *Bryan,* 282 U. S. 765, 773.

[7] Cf. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 120; *Tipton* v. *Atchison, T. & S. F. Ry. Co.,* 298 U. S. 141, 152, 153; *Illinois Central R. Co.* v. *Messina,* 240 U. S. 395, 397.

After careful review of this Court's decisions on the question of intergovernmental immunity, the state court concluded that the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation were "instrumentalities" performing "essential governmental duties" and that state taxation of respondent's salaries violated the Federal Constitution as interpreted by the *Graves* case. Anticipating that this Court might re-examine that interpretation and apply a "different test," the state court said that "Until such is done the States are bound by the decision of the Supreme Court in . . . Rogers v. Graves, supra."

We have now re-examined and overruled the doctrine of *Rogers* v. *Graves* in *Graves* v. *O'Keefe, ante,* p. 466. Salaries of employees or officials of the Federal Government or its instrumentalities are no longer immune, under the Federal Constitution, from taxation by the States. Whether the Utah income tax, by its terms, exempts respondent, can now be decided by the state's highest court apart from any question of Constitutional immunity, and without the necessity, so far as the Federal Constitution is concerned, of attempting to divide functions of government into those which are essential and those which are non-essential.

"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the

term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case." [8]

Applying this principle, we vacate the judgment of the Supreme Court of Utah and remand the cause to that court for further proceedings.

Judgment vacated.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

LOWDEN ET AL., TRUSTEES, *v.* SIMONDS-SHIELDS-LONSDALE GRAIN CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 342. Argued January 30, 31, 1939.—Decided March 27, 1939.

1. Upon the facts of this case, *held* that, within the meaning of a tariff provision, there were "prior arrangements" covering "a specified period of time," between a shipper and the railroad for the installation of grain doors in cars furnished to the shipper, and that the shipper was liable for the tariff charge for such service. P. 520.
2. A shipper can not escape liability to pay lawful tariff charges for carrier service by disclaiming liability when ordering it; nor can the carrier lawfully yield to such disclaimer. *Id.*

   Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.
3. Where, after the commencement of a suit by a railroad to recover from a shipper a tariff charge of $1.00 per car for a service rendered, the Interstate Commerce Commission determined that a charge higher than 60¢ per car for such service was unreasonable and authorized reparations accordingly, the railroad was entitled to recover upon its claim reduced *pro tanto*. P. 521.

97 F. 2d 816, reversed.

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[8] *Patterson* v. *Alabama*, 294 U. S. 600, 607.

CERTIORARI, 305 U. S. 587, to review the affirmance of a judgment in favor of the shipper, 19 F. Supp. 438, in a suit brought by the trustees of a railroad company to recover for carrier services.

Messrs. Hale Houts and *Dean Wood*, with whom *Messrs. Charles M. Miller, Cyrus Crane*, and *William S. Hogsett* were on the brief, for petitioners.

Mr. Melvin W. Borders, Jr., with whom *Mr. Dupuy G. Warrick* was on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

This case is here on certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit affirming a judgment of the district court for the respondent. Certiorari was granted for consideration of a federal question of substance, to wit, whether a carrier's charges for services, actually utilized by a shipper and authorized by a tariff requiring prior arrangements for the services, are uncollectible when the services are rendered on orders, preceded or accompanied by denials of legal liability. Substantial conflict was alleged.[1]

The facts were stipulated. The petitioners, as trustees of the Chicago, Rock Island and Pacific Railway Company, brought suit, under § 24 (8) of the Judicial Code,[2] in the United States District Court for the Western District of Missouri, for the value of services rendered in the installation of grain doors on box cars used by the respondent to ship grain in bulk in interstate commerce.

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[1] Cf. *Wabash Ry. Co.* v. *Horn*, 40 F. 2d 905, 906 (C. C. A. 7).

[2] 28 U. S. C. § 41. "The district courts shall have original jurisdiction as follows: . . . Eighth. Of all suits and proceedings arising under any law regulating commerce." See *Louisville & Nashville R. Co.* v. *Rice*, 247 U. S. 201, 203.

Grain doors are required to prevent leakage of grain from the car while in transit. They are wooden barriers which must be placed inside the box car doors before loading and removed upon unloading. Before July 1, 1935, they were furnished and installed by carriers without separate charge. Effective that day, a tariff filed with the Interstate Commerce Commission continued the carriers' practice of furnishing the materials for grain doors but shifted the cost of installation to the shippers. It provided as follows: "The railroad will act as shipper's agent and install grain doors . . . at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time . . ."

On July 2, 1935, the day after the tariff went into effect, the respondent, together with other shippers, addressed a letter to the local freight agents of several carriers, including the Chicago, Rock Island and Pacific, in which they announced that despite the tariff they expected the railroads, from and after July 1, 1935, to furnish cars with equipment to carry bulk grain safely, and would decline to pay for the service of installing grain doors in the cars. They wrote in part: "Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders [for cars for the shipment of bulk grain] they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading."

The carriers protested that neither they nor the shippers could be parties to practices not in conformity with the tariff. They declared that unless the shippers made unqualified arrangements pursuant to the terms of the tariff, cars would be furnished without the grain doors installed. This letter, dated July 15, 1935, evoked no reply. Between July 1, 1935, and February 29, 1936, the petitioners upon the orders of respondent supplied the

Grain Company with 624 box cars for the shipment of grain in bulk. Before the cars were loaded, the petitioners installed the necessary grain doors. Bills, rendered monthly, charged the respondent $1.00 for each car. On November 22, 1935, the latter returned the bills, declining to pay on the ground that it had made no arrangement for the petitioners to install grain doors as its agents, as contemplated by the tariff. It concluded with a request that petitioners reveal the justification for the charges in the absence of any arrangement. The petitioners' agent replied on January 9, 1936, that the letter of July 2, 1935, had been construed to effect an arrangement and "accepting such prior arrangement, the cars were coopered for your account and as your agent, and were accepted and used by you as such." By letter of January 15, 1936, the respondent disagreed with petitioners' construction of the letter of July 2, 1935, and reiterated its intention not to pay.

On April 4, 1936, the petitioners began this suit, asking judgment for $624. Before trial in the district court, the Interstate Commerce Commission passed upon the validity and reasonableness of the charge for this particular service. On April 12, 1937, the Commission ruled that it was proper to require the shipper to bear the expense of installing grain doors furnished by the carrier; that the clause relative to prior arrangements was not ambiguous; that it was for the carrier's benefit and could be waived; that the charge of $1.00 per car was unreasonable and should be limited to $.60 per car. It ruled further that shippers who had paid the $1.00 charge were entitled to reparation and that carriers might waive collection above the sixty-cent charge from shippers who had not yet paid. 220 I. C. C. 753.[3] The petitioners reduced their demand

[3] Three commissioners dissented. The decision of the Commission is part of the record. *A. J. Phillips Co.* v. *Grand Trunk W. Ry. Co.*, 236 U. S. 662, 664; cf. *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506, 511–12.

in the district court to $.60 per car and asked judgment for $374.40.

The district court gave judgment for the respondent. 19 F. Supp. 438. The circuit court of appeals affirmed, one judge dissenting. 97 F. 2d 816.

The ruling of the Interstate Commerce Commission determines that the installation is a duty of the shipper and that the carrier can only receive sixty cents when it acts for the shipper in performing that duty. These are the essential provisions of the tariff. To facilitate the rendition of the service prior arrangements are required. The dominant elements are the responsibility for and the amount of the charge. These are fixed by the tariff. The letter of July 2, 1935, from the shippers required the installation of the grain doors and the respective orders for the separate cars, given thereafter, were given in the light of this demand for cars so equipped. We think this was an arrangement under the tariff. On July 2, 1935, the respondent clearly signified its desire for cars fully coopered and ready for loading. Its letter of that date was an unconditional request for the petitioners' services for a sufficiently specified period of time—"from and after July 1, 1935." The announcement that respondent would decline to pay for them in no way qualified the request for tariff services, and cannot now stave off liability. The petitioners could disregard this advance disclaimer of liability and rely upon the courts to enforce observance of the tariff. Until changed, tariffs bind both carriers and shippers with the force of law.[4] Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property.[5] That section for-

[4] *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506, 509; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197.

[5] Act of Feb. 4, 1887, 24 Stat. 379, 381, as amended, 49 U. S. C. § 6 (7).

bids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate.[6] It is equally important to aid the efforts of a carrier in collecting published charges in full.[7] Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.

The respondent suggests that the suit must fail because based upon a tariff held by the Interstate Commerce Commission "unreasonable and unlawful." The Commission did not hold the tariff unlawful or wholly unreasonable. It clearly recognized the validity of a tariff charge for installation services rendered by carriers at the request of shippers, but found $1.00 per car unreasonable to the extent that it exceeded $.60. It awarded reparation to those who had paid $1.00 per car and authorized the carriers to waive collection of the amount over $.60 per car from shippers who had not paid.[8] The only relief afforded respondent by the Commission's decision is a right to reparation for all payments over $.60 per car.[9] The voluntary reduction of their claim by the petitioners is a sensible adjustment of their right to recover the tariff charge and of their obligation to make reparation to the extent that it is unreasonable.

It is unnecessary to consider various other contentions made by both the petitioners and the respondent.

Judgment reversed.

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[6] *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507.

[7] Cf. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink,* 250 U. S. 577; *New York Central & Harlem River R. Co.* v. *York & Whitney Co.,* 256 U. S. 406.

[8] Chicago Board of Trade *v.* Abilene & S. Ry. Co., 220 I. C. C. 753, 769.

[9] Cf. *A. J. Phillips Co.* v. *Grand Trunk W. Ry.,* 236 U. S. 662, 665; *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370, 384.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* METROPOLITAN EDISON CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 486. Argued March 10, 1939.—Decided April 3, 1939.

1. Upon a transfer by one Pennsylvania corporation to another of its franchises and assets, pursuant to the Act of April 29, 1874 of that State, as amended, the transferee becomes liable as matter of law for the obligations of the transferor. P. 528.
2. A transfer by one Pennsylvania corporation to another of its assets and franchises, in accordance with the above-cited Act of Pennsylvania, *held* tantamount to a merger, and that the transferee, in computing its income tax under the Federal Revenue Acts of 1926 and 1928, was entitled to deduct unamortized discount and expenses in respect of bonds issued by the transferor and retired by the transferee. P. 529.
3. A transfer by one Pennsylvania corporation to another of its assets, the transferee assuming all of the liabilities of the transferor, including bonds on which the transferee was already liable as guarantor, although it did not comply fully with the above-cited Pennsylvania Act, *held* a *de facto* merger entitling the transferee to a like deduction. P. 529.

98 F. 2d 807; *id.*, 812, affirmed.

CERTIORARI, 305 U. S. 592, to review reversals in two cases of decisions of the Board of Tax Appeals, 35 B. T. A. 1110, 36 *id.* 467, sustaining disallowances of deductions from income tax.

Miss Helen R. Carloss, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. Maurice Bower Saul, with whom *Mr. Bradford S. Magill* was on the brief, for respondent in No. 486.

* Together with No. 487, *Helvering, Commissioner of Internal Revenue,* v. *Pennsylvania Water & Power Co.,* also on writ of certiorari to the Circuit Court of Appeals for the Third Circuit.

Mr. Edwin M. Sturtevant, with whom *Mr. Clyde T. Warren* was on the brief, for respondent in No. 487.

Mr. Justice Roberts delivered the opinion of the Court.

These cases present the question whether, under the Revenue Acts of 1926 and 1928,[1] a Pennsylvania corporation may deduct unamortized bond discount and expense in connection with redemption of the bonds of a subsidiary, all of whose assets it had previously acquired pursuant to local law. The court below answered this question in the affirmative.[2] By reason of a direct conflict of decision we granted the writ of certiorari.[3]

The respondent in No. 486 is a Pennsylvania corporation supplying electric light and power in that state and also operating, through subsidiaries, a system which serves communities in Pennsylvania and Maryland. It filed consolidated returns for itself and its subsidiaries for 1927 and 1928. During 1928 the company retired certain bonds of Pennsylvania corporations which were formerly subsidiaries whose obligations the taxpayer had assumed when it took over their assets by transfers effected pursuant to an Act of the General Assembly of April 29, 1874, as amended and supplemented.[4] When these obligations were redeemed there existed, with respect to them, unamortized discount and expense aggregating $752,481.26, which the company in its return deducted from gross income. The Commissioner ruled against the deduc-

[1] Revenue Act of 1926, §§ 200 (d), 212 (b), 232 and 234 (a) (1) (2) and (4), 44 Stat. 9, 10, 23, 41–42; Revenue Act of 1928, §§ 23 (a) (b) and (f), 41, 42, 43, 48, 45 Stat. 791, 799–800, 805, 807.

[2] 98 F. 2d 807, 812.

[3] See *General Gas & Electric Corp.* v. *Commissioner,* 98 F. 2d 561, in which certiorari was also granted, decided *post* p. 530.

[4] Act of April 29, 1874, P. L. 73, § 23, amended by Act of April 17, 1876, P. L. 30, § 5, and Act of June 2, 1915, P. L. 724, § 1. Purdon's Pa. Stats. Tit. 15, § 595.

tion and determined a deficiency. The Board of Tax Appeals sustained the Commissioner.[5] The Circuit Court of Appeals reversed the Board, holding that the transactions whereby the taxpayer acquired the assets and assumed the liabilities of its former subsidiaries, pursuant to the statute, constituted a merger, as a consequence of which the subsidiaries ceased to exist by operation of law whereas the taxpayer continued to exist and became liable for the subsidiaries' debts both under contract and by operation of law. The court, therefore, held that the unamortized discount and expense was deductible in respect of the subsidiary's bonds.

In 1923 the respondent in No. 486 desired to erect a generating plant for electric energy. Wishing to finance it by a separate bond issue the respondent organized Metropolitan Power Company, a Pennsylvania corporation, as a wholly-owned subsidiary. The taxpayer purchased, guaranteed, and sold, at the same price it had purchased, $3,250,000 of bonds of the subsidiary; purchased all of its stock and loaned it on open account approximately $3,000,000. The Power Company held no public franchises and, under a contract with the taxpayer, sold all of its electricity to the latter at a price sufficient to enable it merely to earn the costs of operation and other charges, including depreciation, taxes, and interest. In 1927, pursuant to State authority, the Power Company sold all its assets subject to its liabilities to the taxpayer, a deficit from operations being charged against the taxpayer's surplus. At the time of the transfer the taxpayer surrendered the stock of the Power Company for cancellation and the latter became inactive and was dissolved in 1928. The taxpayer assumed liability for the outstanding bonds of the Power Company payment of which it

[5] 35 B. T. A. 1110.

had originally guaranteed and, during 1927, called them for redemption and redeemed them. At the time of the redemption there remained unamortized discount and expense incurred in issuing the bonds aggregating $308,-097.90 which the taxpayer deducted from its gross income. The Commissioner ruled against the deduction and the Board of Tax Appeals sustained him.[6] The Court of Appeals reversed the Board, holding that, while the transaction was not consummated under the state statute it nevertheless was under state law a *de facto* merger, and the taxpayer was accordingly entitled to the deduction.

The respondent in No. 487 is a Pennsylvania corporation operating a hydroelectric plant at Holtwood, Pennsylvania. In 1924 it desired to provide its customers with a more adequate supply by an auxiliary steam power plant. As its corporate powers did not permit steam generation of electricity it caused the incorporation of a Pennsylvania company, known as Holtwood Power Company, all of whose shares were purchased and owned by the respondent. With the proceeds of the sale of the Power Company's stock and those of a bond issue the steam plant was erected. This plant sold all its output to the taxpayer which agreed, in return, to pay the Power Company's costs and expenses and an allowance for depreciation, and to pay a sum to provide for amortization of debt, discount, and security issue expense, and the expenses attending the issue, registration and transfer of the capital stock and bonds, all interest on bonds and other indebtedness, and a sum sufficient to provide a net return of eight per cent. on the Power Company's stock. The steam plant was managed by the taxpayer's officers and employes without compensation and was operated as a department of the taxpayer. In 1927 the taxpayer

[6] 35 B. T. A. 1110.

surrendered certain corporate powers so as to be in a position to effect a merger or consolidation with its subsidiary under the Pennsylvania statutes.[7] Thereupon the Power Company conveyed all of its assets and franchises to the taxpayer pursuant to the Pennsylvania Act of 1874 as amended, the sole consideration being the delivery to the subsidiary of all its capital stock held by the taxpayer and the assumption by the taxpayer of the subsidiary's indebtedness. The subsidiary ceased to exist. In 1928 the taxpayer retired the bonds of its former subsidiary and charged off unamortized discount and expense in respect of them in the sum of $145,159.52 and, in its income tax return for that year, claimed a small deduction for amortization for a portion of the year prior to the retirement, and a deduction of the balance of the sum above mentioned as of the date when the retirement took place. The Commissioner disallowed the deduction and determined a deficiency. The Board of Tax Appeals sustained the ruling.[8] The Circuit Court of Appeals reversed the Board.

The petitioner concedes that if there has been a true merger or consolidation whereby the identity of the corporation issuing the bonds continues in the successor and the latter becomes liable for the debts of the former by operation of law, the successor may deduct amortization of discount and expense in respect of bonds issued by its predecessor as well as unamortized discount and expense on any of such bonds retired prior to maturity.[9] The

[7] See *York Haven Water & Power Co.* v. *Public Service Comm'n*, 287 Pa. 241, 249; 134 Atl. 419, 421.

[8] 36 B. T. A. 467.

[9] *American Gas & Electric Co.* v. *Commissioner*, 85 F. 2d 527; *American Gas & Electric Co.* v. *United States*, 17 F. Supp. 151; *New York Central R. Co.* v. *Commissioner*, 79 F. 2d 247; *Western Maryland Ry. Co.* v. *Commissioner*, 33 F. 2d 695; Illinois Power & Light Corp. *v.* Commissioner, 33 B. T. A. 1189; Connecticut Electric Service Co. *v.* Commissioner, 35 B. T. A. 444.

rule is not applicable upon a mere sale by one corporation of all its assets to another which assumes the liabilities of the former.[10]

The contention of the petitioner is that the transactions in issue fall within the latter category. The respondents, on the other hand, insist that, in the light of the applicable statute of Pennsylvania and the decisions of her courts, the transactions constituted mergers in the proper acceptation of that term. The question, then, is solely one respecting the law of Pennsylvania.

Until the complete revision of the corporation laws of the Commonwealth in 1933 there were but two statutes available to corporations seeking to merge or consolidate. The Act of April 29, 1874, § 23, *supra,* so far as material, provides that any corporation, with the consent of its stockholders, may "sell, assign, dispose of and convey to any corporation created under or accepting the provisions of this act, its franchises, and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid. . . ." The Act of May 3, 1909,[11] permits what it terms a merger but what is in truth a consolidation to be effected by a joint agreement of two or more corporations approved by the stockholders setting forth the terms and conditions of the merger and consolidation and providing for the organization of a new corporation to which the franchises and property of the consolidating corporations are to be transferred. This act contemplates the issue of letters patent to the consolidated corporation, and the issue of new stock by it, in lieu of that of the old. The procedure

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[10] *Turner-Farber-Love Co.* v. *Helvering,* 62 App. D. C. 369; 68 F. 2d 416; *American Gas & Electric Co.* v. *Commissioner, supra; American Gas & Electric Co.* v. *United States, supra.*

[11] Purdon's Pa. Stats. Tit. 15, § 421, etc.

under the Act of 1874 has repeatedly been referred to in the decisions of the Supreme Court of the Commonwealth as the "short form" and that under the Act of 1909 as the "long form" of merger.[12]

Inasmuch as the transfer of the franchises and assets is authorized by statute, it seems reasonably clear that the transferee is, as matter of law, liable for the obligation of the transferor. The cases indicate that this is so.[13] The petitioner argues and the Circuit Court of Appeals for the Second Circuit has held to the contrary, in reliance on *Merwine* v. *Mt. Pocono Light & Imp. Co.*, 304 Pa. 517; 156 Atl. 150. That court thought the case indicated that the liability, if any, of the transferee was not under the statute but was only that of a fraudulent transferee under 13 Eliz., chap. 5. Action for a tort had been brought against the transferor prior to a transfer under the Act of 1874. After the conveyance the defendant filed a suggestion that the property had been conveyed in proceedings under the Act, that the defendant had ceased to exist, and that the action should be abated. The plaintiff sought to substitute the transferee as defendant. The trial court denied substitution and abated the action. The Supreme Court held that the termination of corporate existence of the defendant under the Act of 1874 did not abate the action, but that if the plaintiff recovered a judgment she could "levy wherever defendant's assets liable for the judgment may be found," which seems to

[12] See *York Haven Water & Power Co.* v. *Public Service Comm'n*, 287 Pa. 241, 246; 134 Atl. 419, 420; *Buist's Estate*, 297 Pa. 537, 541; 147 Atl. 606, 607; compare Stockley Penna. Corp. Laws 1933, pp. 39, 104; *Pennsylvania Utilities Co.* v. *Public Service Comm'n*, 69 Pa. Super. Ct. 612.

[13] *Berkovitz's Appeal*, 319 Pa. 397, 407; 179 Atl. 746 at 751; *Commonwealth* v. *Merchants National Bank*, 323 Pa. 145, 153; 185 Atl. 823, 827.

us to mean no more than that the assets after the conveyance remained subject to the transferor's liabilities. A transfer fully authorized by statute cannot be a fraudulent conveyance within the 13 Eliz.

We are of opinion that a transfer without valuable consideration, with the intent that the transferor shall, as the statute provides, cease to exist, made in accordance with the statute, has all the elements of a merger and comes within the principle that the corporate personality of the transferor is drowned in that of the transferee. It results that the continuing corporation may deduct unamortized bond discount and expense in respect of the obligations of the transferring affiliate.

A somewhat different question arises with respect to the transfer of assets of Metropolitan Power Company. It is admitted that this transfer was not made in accordance with the terms of the Act of 1874. No franchises were transferred because the Metropolitan Power Company held no public franchises of any kind. The transfer was merely of assets with the assumption of all the liabilities by the transferee. It is important to note, however, that amongst the liabilities assumed were bonds on which the parent company was already liable as guarantor. The court below has held, and we concur, that, under the law of Pennsylvania, the transfer in question constituted a *de facto* merger, even though the transfer did not comply with all the provisions of the Act of 1874,[14] and that, as matter of law, the taxpayer would be liable for the debts of the transferor.

Judgments affirmed.

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[14] *Commonwealth* v. *Merchants National Bank, supra,* p. 152.

GENERAL GAS & ELECTRIC CORP. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 492 and 493. Argued March 10, 1939.—Decided April 3, 1939.

Decided upon the authority of *Helvering* v. *Metropolitan Edison Co.*, *ante*, p. 522.
98 F. 2d 561, reversed.

CERTIORARI, 305 U. S. 593, to review the affirmance of a decision of the Board of Tax Appeals sustaining the determination of a deficiency in income tax.

Mr. Maurice Bower Saul, with whom *Mr. Bradford S. Magill* was on the brief, for petitioner.

Miss Helen R. Carloss, with whom *Solicitor General Jackson*, *Assistant Attorney General Morris*, and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These are companion cases to Nos. 486 and 487, *ante*, p. 522, and involve the same question. The Circuit Court of Appeals held that conveyances by subsidiaries to the taxpayer, consummated under the Act of April 29, 1874, did not constitute mergers so as to authorize the taxpayer to take a deduction for unamortized bond discount and expense in respect of bonds issued by the subsidiaries prior to the conveyance.

For reasons given in Nos. 486 and 487 the judgments must be

Reversed.

KOHN ET AL., ADMINISTRATORS, v. CENTRAL DISTRIBUTING CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 177. Argued March 1, 2, 1939.—Decided April 17, 1939.

A suit in the federal court to enjoin enforcement of a state tax, alleged to be unconstitutional, will not lie where the enforcement is by suit pending in a state court and where the state courts afford a plain, speedy and efficient remedy. Judicial Code §§ 265 and 24, par. 1, as amended by Act of August 21, 1937. P. 534.
Affirmed.

APPEAL from a judgment of the District Court, of three judges, which denied applications for temporary and permanent injunctions and dismissed the bill, in a suit to restrain enforcement of a state liquor tax.

Mr. Harvey H. Smith for appellants.

Mr. J. J. Leary, with whom *Messrs. Hubert Meredith,* Attorney General of Kentucky, *Clifford E. Smith,* and *Samuel M. Rosenstein* were on the brief, for appellees.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Commonwealth of Kentucky, acting through its Commissioner of Revenue, brought suit in the Franklin Circuit Court of that State to recover the amount of a tax claimed to be due from the Central Distributing Company, a Kentucky corporation. A writ of attachment was issued and levied upon certain whiskey which appellants claimed was subject to their lien under a chattel mortgage executed by the company. The mortgagor was in default and appellants had taken possession of the property.

Contending that the statutes under which the tax was assessed and sought to be enforced (Alcohol Control Act, effective March 17, 1934, Alcohol Beverage Tax Act, effective May 1, 1936, and Alcohol Beverage Control Law, effective March 7, 1938) were invalid under the state constitution and also under the commerce clause, the contract clause, and the due process clause of the Fourteenth Amendment, of the Federal Constitution, appellants brought this suit in the federal court against the Commonwealth, on relation of the Commissioner of Revenue, and the Sheriff, to restrain the proceedings to collect the tax and to prevent the defendants from disposing of the property which had been attached.

Defendants moved to dismiss the petition upon the ground that the plaintiffs had an adequate legal remedy and that the court was without jurisdiction to grant the relief sought.

On hearing of the application for a temporary and permanent injunction, the District Court, composed of three judges, dismissed the petition. The court stated that it was its opinion that § 12 of the Alcohol Control Act of 1934 "furnishes petitioners an adequate remedy . . . to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky" thereunder. The case comes here on appeal. Jud. Code, § 266, 28 U. S. C. 380.

Appellants contest the ruling of the District Court, asserting that under § 12 of the Act of 1934—the text of which is set forth in the margin [1]—the remedy is given

[1] Section 12 of the Act of 1934 (Carroll's Kentucky Statutes, Baldwin's 1936 Revision, § 4214a–23) is as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax levied by this Act. The aggrieved taxpayer shall pay with or without protest the tax as and when required and may at any time within two years from the date of such payment sue the Commonwealth through its agent, the Auditor of

only to the *taxpayer* and is not available to appellants, the taxpayer's mortgagees. The Commonwealth urges the contrary, but points to no decision of the state court which is decisive of that point.

Apart from that question, the Commonwealth insists that appellants had a plain and adequate remedy by appearing in the attachment suit in the Franklin Circuit Court where all issues as to the validity of the tax and the propriety of the proceedings for enforcement could be litigated and determined, with the ultimate right of review in this court of any federal question raised and decided. The Commonwealth points to the provision of the Civil Code of Practice of Kentucky, § 29,[2] under which any person claiming an interest in property which has been attached may file his petition stating his claim

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Public Accounts, in an action at law in any court, state or federal, otherwise having jurisdiction of the parties and subject matter, for the recovery of the tax paid with legal interest thereon from the date of payment. If it is finally determined that said tax or any part thereof was wrongfully collected, for any reason, it shall be the duty of the Auditor of Public Accounts to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with legal interest thereon. The Treasurer shall pay the same at once out of the general expenditure fund of the State in preference to other warrants or claims against the Commonwealth. A separate suit need not be filed for each individual payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made."

[2] The text of § 29 of the Civil Code of Practice is as follows:

"In an action or proceeding for the recovery of real or personal property, or for the subjection thereof to a demand of the plaintiff under an attachment or other lien, any person claiming a right to, or interest in, the property or its proceeds, may, before payment of the proceeds to the plaintiff, file, in the action, his verified petition stating his claim and controverting that of the plaintiff; whereupon the court may order him to be made a defendant; and upon that being done, his petition shall be treated as his answer. But if he be a non-resident he must give security for costs."

and controverting that of the plaintiff in the attachment whereupon he may be made a defendant, his petition being treated as an answer. See, also, Carroll's Kentucky Statutes, Baldwin's 1936 Revision, § 950–1.

Appellants assert that the Franklin Circuit Court was without jurisdiction of the attachment suit, but that question, appropriately one for the decision of the state court, could manifestly be presented and determined in that action.

Appellants also state that in the present suit they asked the federal court to exercise its equity powers in their aid in the foreclosure of their mortgage, but it is apparent that this relief is merely incidental and that the main object of the suit is to restrain the proceedings in the Franklin Circuit Court which had been brought to enforce the collection of the tax.

This endeavor, aside from the application of the general principle governing the equity jurisdiction, encounters two positive statutory prohibitions; (1) that of § 265 of the Judicial Code (28 U. S. C. 379) providing that an injunction shall not be granted to stay proceedings in a state court (*Essanay Film Co.* v. *Kane,* 258 U. S. 358, 361; *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, 97; *Hill* v. *Martin,* 296 U. S. 393, 403); and (2) the provision of the Act of August 21, 1937 (c. 726, 50 Stat. 738) amending the first paragraph of § 24 of the Judicial Code to the effect that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

The judgment is

Affirmed.

HIGGINBOTHAM *v.* CITY OF BATON ROUGE.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 462. Argued March 3, 1939.—Decided April 17, 1939.

1. Before the expiration of the incumbent's term, the municipal office of Commissioner of Public Parks and Streets to which he had been elected was abolished by later legislation, pursuant to which he was employed, until the next election, to render as Superintendent of Parks and Streets under control of the Mayor the same service pertaining to the governmental functions of the city in the supervision of its parks and streets as he had rendered as Commissioner and at the same salary. *Held* that later action of the legislature and the city terminating the employment before the term had expired was within the legislative power over public offices and not an impairment of contract obligation within the meaning of the contract clause of the Constitution. Pp. 535, 539.
2. While this Court in applying the contract clause of the Constitution must reach an independent judgment as to the existence and nature of the alleged contract, great weight is attached to the views of the highest court of the State. P. 538.

190 La. 821; 183 So. 168, affirmed.

APPEAL from the affirmance of a judgment dismissing the complaint in an action against the City to recover money alleged to be due as salary.

Mr. Paul G. Borron, with whom *Messrs. Edward Rightor* and *E. R. Schowalter* were on the brief, for appellant.

Messrs. Fred G. Benton and *H. Payne Breazeale* were on a brief for the appellee.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The City of Baton Rouge, in March, 1935, pursuant to Act No. 1 of the First Extraordinary Session of 1935 of the legislature of Louisiana, adopted an ordinance declar-

ing that the City was without authority to retain appellant, Powers Higginbotham, as Superintendent of Public Parks and Streets, and that his employment in that capacity was terminated. Contending that he had been employed for a term continuing until November, 1936, and that the legislation abovementioned constituted an impairment of the obligation of his contract in violation of § 10 of Article I of the Constitution of the United States, appellant brought this suit to recover the balance of his salary for the stated term. The Supreme Court of the State affirmed the judgment dismissing his complaint. 190 La. 821; 183 So. 168.

The pertinent legislation with respect to the municipal position in question is comprehensively reviewed in the opinion of the state court. It appears that the City of Baton Rouge has a commission form of government adopted in 1914 under the provisions of Act No. 207 of 1912. The authority of the Commission Council is divided among three departments, viz. (1) the Department of Public Health and Safety, (2) the Department of Finance, and (3) the Department of Public Parks and Streets. It was provided that a Commissioner should be elected for each department, the Mayor being *ex officio* Commissioner of Public Health and Safety. In 1921 the terms of office of the members of the Commission Council were fixed at four years, the election to be had in April. Appellant was elected Commissioner of the Department of Public Parks and Streets in April, 1931, for a term which was to expire in May, 1935. But in 1934 the date for the election of officers was postponed to November, 1936, and appellant's term of office was extended accordingly. Later, by Act No. 13 of the Third Extraordinary Session of 1934, the legislature abolished the office of Commissioner of Public Parks and Streets and transferred its functions to the Mayor. There was also created a Department of State Coordination and Public Welfare

and provision was made for the election of a Commissioner of that Department. This was followed by a proviso that the person then filling the office of Commissioner of the Department of Public Parks and Streets should be entitled to enter the employ of the City, at a salary equal to that theretofore allowed to the Commissioner, "in the work under the said Mayor and said person shall have the right to continue in said service during good behavior until the next general election of officers in said municipality." Appellant was the person thus described, and accordingly, in January, 1935, the Commission Council adopted an ordinance reciting the statutory provisions and providing for the employment of appellant as Superintendent of Public Parks and Streets, under the Mayor, "at the same salary now provided for the Commissioner of Public Parks and Streets, his employment to continue during good behavior and until the next general election for municipal officers." Appellant accepted the employment and entered upon the discharge of his duties, as to the faithful performance of which no question is raised.

The state court held that the position in question was "in the nature of a public office" with governmental functions and that the legislative action in abolishing it did not contravene the constitutional provision as to impairment of contracts. The court referred to the provision of the Act of 1912 abovementioned that "all the powers and authority" conferred upon the City by its charter, not inconsistent with the provisions of the Act, were declared to be "reserved to the City unimpaired" to be exercised by the Mayor and Commission Council. Further, that by the charter of the City (§ 7 of Act No. 169 of 1898) it was provided "that the 'employees' of the City are removable as thereinafter specified" and that by a subsequent provision (§ 52 as amended by Act No. 249 of 1914) it was declared that "all officers elected by the

Council shall be removable by the Council at pleasure." Again, that by the Act of 1912 it was declared that "any official or assistant elected or appointed by the Commission Council may be removed from office at any time by a vote of the majority of the members of the Council," except as therein otherwise provided, and that there was no exception elsewhere that might be applicable to the present case. The court said that the general rule that a municipal council "may remove at any time any official appointed or elected by the council, or anyone employed by the council to perform governmental functions," had been recognized in its former decisions, which were cited. 183 So. at p. 172.

In this view the state court was of the opinion that the case was not controlled by *Hall* v. *Wisconsin,* 103 U. S. 5, upon which appellant relies,—a case of a contract with a State for the performance of specific services of a scientific character under a statute providing for "a geological, mineralogical and agricultural survey"—a contract which was held to be within the constitutional protection, and rather that the case was governed by the general doctrine reaffirmed in *Newton* v. *Commissioners,* 100 U. S. 548, 557. While the particular question was not involved in that case, the court stated the familiar principle that "the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service." *Id.,* p. 559. See, also, *Butler* v. *Pennsylvania,* 10 How. 402; *Crenshaw* v. *United States,* 134 U. S. 99, 106; *Phelps* v. *Board of Education,* 300 U. S. 319, 322; *Dodge* v. *Board of Education,* 302 U. S. 74, 78, 79.

While this Court in applying the contract clause of the Constitution must reach an independent judgment as to the existence and nature of the alleged contract (*Larson* v.

South Dakota, 278 U. S. 429, 433; *United States Mortgage Co.* v. *Matthews,* 293 U. S. 232, 236), we attach great weight to the views of the highest court of the State. *Coombes* v. *Getz,* 285 U. S. 434, 441; *Phelps* v. *Board of Education, supra; Dodge* v. *Board of Education, supra.* In this instance we find no reason for disagreeing with the conclusion reached by the Supreme Court of Louisiana. The Act providing for appellant's "employment" did not change the nature of the duties which he had been performing as Commissioner. Instead of acting as Commissioner he rendered the same service as Superintendent of Public Parks and Streets under the control of the Mayor. His duties still distinctly pertained to the performance of the ordinary governmental functions of the City in the supervision of its streets and parks and his position as Superintendent both with respect to duties and tenure may properly be regarded as subject to the control of the legislature and of the Commission Council acting under its authority.

The judgment is

Affirmed.

HONEYMAN *v.* JACOBS ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 465. Submitted February 10, 1939.—Decided April 17, 1939.

A state law providing that a mortgagee who has bid in the property at foreclosure sale shall have no deficiency judgment if the value of the property equals the amount of the debt and interest plus costs and expenses, does not impair the obligations of preëxisting mortgage contracts within the intendment of the contract clause of the Constitution. *Richmond Mortgage Corp.* v. *Wachovia Bank,* 300 U. S. 124, 128. P. 545.

278 N. Y. 467; 17 N. E. 2d 131, affirmed.

APPEAL from a judgment affirming a judgment which confirmed a foreclosure sale to the appellant as mort-

gagee-purchaser but overruled his motion for a deficiency judgment.

Mr. Robert B. Honeyman submitted for appellant.

Messrs. John J. Bennett, Jr., Attorney General of New York, *Henry Epstein*, Solicitor General, and *John F. X. McGohey* and *Benjamin Heffner*, Assistant Attorneys General, submitted for appellees.

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case, coming here on appeal from the state court, presents the question of the validity under the contract clause of the Federal Constitution of § 1083a of the Civil Practice Act of New York (Chapter 794 of the Laws of 1933)[1] under which the appellant, a mortgagee of real

[1] Section 1083-a, provides:

"1083-a. *Limitation Upon Deficiency Judgments During Emergency Period.*—No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the ac-

property, was denied a deficiency judgment in a foreclosure suit, where the state court found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage.

The mortgage was executed in February, 1928, that is, prior to the legislation in question, to secure a bond for $15,000, with interest, payable in February, 1931. On default in payment, appellant, the holder of the bond and mortgage, brought suit for foreclosure and judgment for foreclosure and sale was entered in April, 1938. The property was then sold to appellant for the sum of $7500. In the referee's report of sale the amount due on the bond and mortgage was stated to be $15,771.17, and the taxes, fees and expenses amounted to $1319.03, leaving a deficiency of $9590.20.

Section 1083–a of the Civil Practice Act required that the right to a deficiency judgment should be determined in the foreclosure suit. *Honeyman* v. *Hanan,* 275 N. Y. 382; 9 N. E. 2d 970; 302 U. S. 375, 378. Accordingly, appellant made his motion in that suit to confirm the sale and for deficiency judgment. Proof was submitted to the court that the present value of the property was $25,318. It does not appear that the correctness of this valuation was contested. The court thereupon confirmed the sale and denied the motion for deficiency judgment upon the ground "that the value of the property is equal to the debt of the plaintiff." Appellant's contention that § 1083–a as thus applied violated the contract clause of the Constitution was overruled and this ruling was sus-

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tion including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

tained by the Court of Appeals. 278 N. Y. 467; 17 N. E. 2d 131. The court followed its earlier decisions, citing *Honeyman* v. *Hanan,* 275 N. Y. 382; 9 N. E. 2d 970; *Klinke* v. *Samuels,* 264 N. Y. 144; 190 N. E. 324; *City Bank Farmers Trust Co.* v. *Ardlea Corporation,* 267 N. Y. 224; 196 N. E. 34.

Appellant invokes the principle that the obligation of a contract is impaired by subsequent legislation which under the form of modifying the remedy impairs substantial rights. See *Sturges* v. *Crowninshield,* 4 Wheat. 122, 200; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 553, 554; *Antoni* v. *Greenhow,* 107 U. S. 769, 775; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 430, 434, and cases cited, note 13; *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 433; *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 60. As we said in *Richmond Mortgage Corp.* v. *Wachovia Bank,* 300 U. S. 124, 128, "The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."

We have heretofore decided that the requirement of § 1083–a that the right to a deficiency judgment must be determined in the foreclosure suit raises no substantial question under the contract clause. *Honeyman* v. *Hanan,* 302 U. S. at p. 378. The question is whether in the instant case the denial of a deficiency judgment substantially impaired appellant's contract right. The bond provided for the payment to him of $15,000 with the stipulated interest. The mortgage was executed to secure payment of that indebtedness. The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses

of the suit. Having a total debt of $15,771.17, with expenses, etc., of $1319.03, appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over $25,000. He has that in hand. We know of no principle which entitles him to receive anything more. Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there was any constitutional sanction for such a provision which precluded the legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt.

Section 1083–a in substance assured to the court the exercise of its appropriate equitable powers. By the normal exercise of these powers, a court of equity in a foreclosure suit would have full authority to fix the terms and time of the foreclosure sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or the price bid was inadequate. *Home Building & Loan Assn.* v. *Blaisdell, supra,* at pp. 446, 447, and cases cited, note 18. *Richmond Mortgage Corp.* v. *Wachovia Bank, supra,* at p. 129. In this control over the foreclosure sale under its decree, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would thus realize upon the mortgage debt if the sale were confirmed. See *Monaghan* v. *May,* 242 App. Div. 64, 67; 273 N. Y. S. 475; *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 247 App. Div. 294; 285 N. Y. S. 464.

The reasoning of this Court in *Richmond Mortgage Corp.* v. *Wachovia Bank, supra,* is applicable and governs our decision. There, a statute of North Carolina, enacted after the execution of notes secured by a deed of trust, provided that where a mortgagee caused the sale of mortgaged property by a trustee and, becoming the purchaser for a sum less than the amount of the debt,

thereafter brought an action for a deficiency, the defendant was entitled to show, by way of defense and set-off, that the property sold was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property, and thus defeat the claim in whole or in part. Under the former law of that State, when the mortgagee became the purchaser at the trustee's sale under a power in the deed of trust, he might thereafter in an action at law recover the difference between the price he had bid and the amount of the indebtedness. We found that the other remedy by bill in equity to foreclose the mortgage was still available. And that in such a proceeding the chancellor could set aside the sale if the price bid was inadequate, and, in addition, he might award a money decree for the amount by which the avails of the sale fell below the amount of the indebtedness but that "his decree in that behalf would be governed by well-understood principles of equity." The Court was of the opinion that the statute modifying one of the existing remedies for realizing the value of the security could not "fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full." The act recognized the obligation of his contract and his right to its full enforcement but limited that right "so as to prevent his obtaining more than his due. By the old and well known remedy of foreclosure, a mortgagee was so limited because of the chancellor's control of the proceeding." That "classical method" of realization upon a mortgage security through a foreclosure suit had always been understood "to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee." In that view it appeared that the new law as to proceedings for a deficiency judgment after the exercise of a power of sale "merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent

with that in equity." And that did "not impair the obligation of the contract."

We reach a similar result here upon the same ground—that under the finding of the state court the mortgagee has obtained satisfaction of his debt and that the denial by the statute of a further recovery does not violate the constitutional provision.

The judgment is

Affirmed.

CARRIER ET AL. *v.* BRYANT.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 541. Argued March 27, 28, 1939.—Decided April 17, 1939.

Negotiable notes and United States bonds purchased, and held as investments, for an incompetent World War veteran by his guardian out of "payments of benefits" made to him by the United States under laws relating to such veterans, *held* not exempt under § 3 of the Act of August 12, 1935 from execution upon a judgment against the incompetent. P. 547.

214 N. C. 174; 198 S. E. 651, affirmed.

CERTIORARI, *post,* p. 622, to review the affirmance of a decree dissolving an order which restrained respondent from executing upon a judgment.

Mr. John W. Wood for petitioners.

Mr. Frederick D. Hamrick, Jr., with whom *Mr. Frederick D. Hamrick* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Supreme Court, North Carolina, ruled that negotiable notes and United States bonds purchased, and held as investments, for an incompetent World War veteran

by his guardian out of "payments of benefits" authorized under laws relating to such veterans, were subject to execution upon a judgment against the incompetent. Petitioners challenge that view and claim immunity under § 3 Act August 12, 1935 (c. 510, 49 Stat. 607, 609; 38 U. S. C. § 454a).

"Sec. 3. Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. Section 4747 of the Revised Statutes and section 22 of the World War Veterans' Act, 1924, are hereby repealed, and all other Acts inconsistent herewith are hereby modified accordingly. The provisions of this section shall not be construed to prohibit the assignment by any person, to whom converted insurance shall be payable under title III of the World War Veterans' Act, 1924, of his interest in such insurance to any other member of the permitted class of beneficiaries.

"Sec. 5. That this Act shall take effect and be in force from and after its passage, but the provisions hereof shall apply to payments made heretofore under any of the Acts mentioned herein."

The conclusion below is supported by *McCurry* v. *Peek*, (1936) 54 Ga. App. 341; 187 S. E. 854, the only other opinion squarely upon the point here involved which has been called to our attention.

The language of § 3, although not entirely felicitous, conflicts with the petitioners' insistence.

The first sentence grants exemption from taxation, claims of creditors, attachment, levy or seizure under any legal process whatever. The things exempted are "payments of benefits" due or to become due either before or after receipt by the beneficiary.

Investments purchased with money received in settlement of benefits are not such payments due or to become due. Accordingly, giving the words employed their ordinary meaning, the notes and bonds in question are not exempted by the first sentence in § 3. It left them, like other property, subject to taxation, claims of creditors, and legal process.

The second sentence in the section clearly recognizes the distinction between benefit payments and property purchased with money therefrom. It declares the exemption provisions in the first sentence shall not attach to claims of the United States; also that exemption from taxation shall not extend to property purchased out of benefit payments. Nothing is said concerning claims of creditors. Nevertheless, petitioners seem to maintain, immunity from these must be inferred. But a mere declaration that investments always subject to taxation shall not enjoy exemption therefrom affords no basis for holding them free from claims of creditors. Although the first sentence extended no immunity to investments, apparently out of abundant caution, the second declared them subject to taxation.

We find nothing in the history or supposed purpose of the enactment adequate to support a construction not in accord with the ordinary import of the words employed.

Under *Spicer* v. *Smith,* (1933) 288 U. S. 430, 434, payment of benefits to the guardian vested title in the ward. The exemptions of the statute would not be different if the ward had personally received the payments.

Section 4747 Revised Statutes, Act March 3, 1873 (38 U. S. C. § 54) remained in force until repealed by Act August 12, 1935. It provided—

"No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension-Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

This section was considered in *McIntosh* v. *Aubrey*, (1902) 185 U. S. 122, 124, where it was unsuccessfully claimed that property purchased with pension money could not be seized under an execution. It was there said—

"The language of the section of itself seems to present no difficulty, and if doubt arises at all it is only on account of the decisions of courts whose opinions are always entitled to respect. . . . But notwithstanding, we think the purpose of Congress is clearly expressed. It is not that pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be exempt in one situation, to wit, when 'due or to become due.' From that situation the pension money of plaintiff in error had departed."

Section 22 World War Veterans' Act, 1924, c. 320, 43 Stat. 607, 613 (38 U. S. C., § 454), repealed by Act August 4, 1935, provided—

"That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and shall be exempt from all taxation: *Provided,* That such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable. . . ."

Trotter v. *Tennessee,* (1933) 290 U. S. 354, 356–357, construed this section. A veteran had purchased land in Tennessee with money received as compensation, and claimed exemption from taxation. We said—

"The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian. *McIntosh* v. *Aubrey,* 185 U. S. 122. We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. . . . Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises."

In 1935 Congress gave much consideration to the exemption which should be accorded to veterans. The outcome is shown by §§ 3 and 5, Act August 12, 1935, *ante,* p. 546.

Section 3 of that Act came under review in *Lawrence* v. *Shaw,* (1937) 300 U. S. 245, 249–250. Exemption was successfully claimed for bank deposits standing in the name of a veteran's guardian upon the view that such deposits, made in the ordinary course and subject to demand for the veteran's use, should be treated as if money in his hands.

"The World War Veterans' Act, 1924, provided that the compensation and insurance allowances should be 'exempt from all taxation.' The Act of 1935 is more specific, providing that the payments shall be exempt from taxation and shall not be liable to process 'either before or after receipt by the beneficiary.' There was added the qualification that the exemption should not extend 'to

any property purchased in part or wholly out of such payments.' This more detailed provision was substituted for that of the earlier Act and was expressly made applicable to payments theretofore made. We think it clear that the provision of the later Act was intended to clarify the former rather than to change its import and it was with that purpose that it was made retroactive. . . . The provision of the Act of 1935 that the exemption should not apply to property purchased out of the moneys received from the Government shows the intent to deny exemption to investments, as was ruled in the *Trotter* case."

The questioned judgment must be

Affirmed.

HONOLULU OIL CORP. ET AL. *v.* HALLIBURTON ET AL.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 466. Argued March 3, 6, 1939.—Decided April 17, 1939.

Claims 8 to 19 of Simmons' Patent No. 1,930,987 (claims 8 and 18 being method claims, and the others apparatus claims), for a method and apparatus for testing productivity of formations encountered in drilling oil and other deep wells by the rotary method, *held* invalid for want of invention. Pp. 559, 562.

98 F. 2d 436, reversed in part; affirmed in part.

WRITS of certiorari issued on cross-petitions, 305 U. S. 591, to review a decree which, reversing in part a decree of the District Court, 18 F. Supp. 58, held certain apparatus claims of a patent invalid and certain method claims valid and infringed.

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* Together with No. 479, *Halliburton et al.* v. *Honolulu Oil Corp. et al.*, also on writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Mr. A. W. Boyken, with whom *Mr. A. J. Hill* was on the brief, for Honolulu Oil Corp. et al.

Messrs. Leonard S. Lyon and *William H. Davis,* with whom *Messrs. Frederick S. Lyon, Henry S. Richmond,* and *Ben F. Saye,* for Halliburton et al.

Mr. Justice Butler delivered the opinion of the Court.

This suit presents questions of validity and infringement of Patent No. 1,930,987 applied for February 10, 1926 by Simmons and, after assignment, issued October 17, 1933, to Halliburton. It is for a method and apparatus for testing productivity of formations encountered in oil and other deep wells drilled by the rotary method.

The writs were granted, on petition of defendants Honolulu Oil Corporation, Ltd. et al. and cross-petition of plaintiffs Halliburton, et al., to review a decree [1] of the circuit court of appeals for the ninth circuit holding that the method claims are valid and infringed and to that extent reversing a decree [2] of the district court of southern California holding that the method and apparatus claims are invalid.

There was an earlier suit for infringement of the same patent brought by these plaintiffs in the federal court for the eastern district of Texas against other defendants. That court sustained the patent and found it infringed. The circuit court of appeals for the fifth circuit reversed.[3] It held the method claims invalid for lack of invention and that, while the apparatus claims may define a simplifying improvement upon which a combination patent might rest, the apparatus was not of such character as to be infringed by the accused tool of defendants.

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[1] 98 F. 2d 436.

[2] 18 F. Supp. 58.

[3] 88 F. 2d 270.

In recent years rotary drilling has been widely used in sinking deep oil wells. Boring is done by rotation of a bit attached to a steel pipe which when so used is called a "drill stem." A smaller bore, called "rat-hole," sometimes precedes, and is reamed out to obtain, the full size hole. To aid operation, drilling fluid (mud-laden water) is pumped into the upper end of the drill stem and escapes into the well at high velocity through holes in the bit. It rises through the space between the pipe and the earth walls of the well and carries to the surface cuttings made by the bit. It holds back and seals the penetrated formations. Hydrostatic pressure of the drilling fluid is very great and the fluid in a penetrated formation will not flow into the well unless it is under greater pressure. It is often desirable to secure a sample of the fluid within a stratum in the bottom of the well without removing the drilling fluid. The patent in suit is for a method and apparatus intended to accomplish that purpose.

The method claims are 8 and 18. Claim 8 is as follows: "A method of testing the productivity of a formation encountered in a well containing drilling fluid, which includes lowering an empty string of pipe into the well through the drilling fluid to adjacent the formation, the pipe carrying a packer [4] and having a valved inlet at its lower end which is closed while the pipe is being lowered, setting the packer above the formation to seal off the drilling fluid from the formation, opening the valved inlet after the packer is set to permit cognate fluid [5] from the formation to enter the pipe, closing the valved inlet against the entrance of fluid from the well by movement of the pipe, raising the pipe so closed to remove an en-

[4] Webster's New International Dictionary, 2nd ed., 1935: "*packer* . . . A device to pack the space between the wall of a well and the pipe or between two strings of pipe in a well."

[5] That is, oil, gas, water, or other fluid encountered in formations penetrated by the bit.

trapped sample and the packer from the well." Claim 18 is printed in the margin.[6]

The apparatus claims in suit are 9 to 17 inclusive and 19. Claim 15 is typical: "Apparatus for testing the productivity of a formation encountered in a well containing drilling fluid, comprising a single empty string of pipe to be lowered into the well through the drilling fluid to adjacent the formation to be tested, a packer lowered into the well by said string of pipe for sealing off the drilling fluid from the formation to be tested, said packer adapted to be positively pressed against the walls of the formation to seal off the same, means at the lower end of said string of pipe to receive fluid from said formation including an inlet opening into said pipe below said packer and a valve structure for controlling the inlet, said valve structure having a relatively stationary part connected to the packer and a relatively movable part connected to the pipe."

Sustaining the claims in suit, the district court for eastern Texas found: Plaintiffs have a large business under the patent in suit. Prior to the discovery there was no apparatus or method in use for testing productivity of formations in wells containing drilling fluid except by putting in a casing and removing the fluid. This patent

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[6] "18. A method of testing the productivity of a formation encountered in a well containing drilling fluid involving the insertion of only a single string of pipe into the well to make a test, which includes lowering a test string into the well through the drilling fluid with a packer carried by the string and a valve inlet at the lower end of the string closed against the entrance of fluid from the well, setting the packer above the formation and opening the valve to permit cognate fluid from the formation to enter the inlet, closing the valve to prevent the subsequent entrance of fluid from the well through the inlet and releasing the packer, and raising the test string with the inlet closed against entrance of fluid from the well to remove an entrapped sample."

first disclosed testing apparatus and method requiring only a single string of pipe.

In this suit the trial court found: The Franklin Patent No. 263,330, dated August 29, 1882, anticipates both the method and apparatus covered by the patent in suit. The use of a packer is necessarily implied from the language of the Franklin patent. Without one, that device could not perform the functions attributed to it. Plainly, it may be used as a tester; for by its use the contents of the producing stratum, sealed off from the rest of the well and unimpeded in its entry into the rat-hole by pressure of the rotary mud, can be brought undiluted to the surface by a mechanism almost duplicating that shown by the patent in suit. A packer to separate one stratum of the oil well from another is old in the art.

And it also found: The Cox Patent No. 1,347,534, dated July 27, 1920, and the Edwards Patent No. 1,514,-585, dated November 4, 1924, substantially disclose the method and device claimed in the patent in suit. The object of these patents, like that of the one in suit, was to ascertain productivity of the stratum being drilled. There was no actual commercial use of the device disclosed and claimed in the patent in suit. It was impractical, due to difficulty in operating at increased length. The inventor himself was employed to devise improvements in the valve structure. If valid at all, the patent must be restricted to its precise form. The method claims are invalid for want of invention. In important respects, defendants' devices differ in operation from the device disclosed and claimed by the patent in suit; they are not infringements of it.

And that court decreed that as to all claims in suit, the patent is invalid.

The opinion of the circuit court of appeals for the fifth circuit considers the questions of invention here involved. In substance, it says:

Method claim 18, taken as typical, assumes familiar apparatus and claims a monopoly on a new use of the old apparatus to achieve a result in a better way. That apparatus includes a single string of pipe lowered into the well, a packer on the string, and a valve at the lower end. These simple and well-known elements are to be used by lowering the pipe into the well with the valve closed against the drilling fluid until the packer is set, then by opening the valve to admit cognate fluid below the packer, then by closing the valve so as to prevent the drilling fluid from entering when the packer is released and the pipe drawn up with its contents. No novelty and certainly no invention can be claimed for the method.

Packers and pipes with valves in them have long been in use to get what is below the packer free from what is above and without removing what is above. Whether a large quantity from a finished well or a simple sample from an unfinished well does not materially alter the method. Water has always been encountered in oil wells; the drilling fluid is only very muddy water voluntarily put and kept in the well for special reasons. Expansible and removable packers with pipes through them to reach the oil, gas, or other desired fluid beneath and rat-hole packers set by the weight of the pipe pressing them down and removable by simply lifting them are shown in earlier patents.[7]

The simplicity of the method in suit along with all its operations, was reasonably disclosed in the old patent to Franklin. There is the single pipe with a packer mentioned, but function esteemed so familiar as to need no emphasis, capable of being lowered into and withdrawn from a well, with the entrance into or escape from the pipe

[7] The opinion refers to Stewart, No. 171,589, December 28, 1875; Stewart, No. 230,080, July 13, 1880; Koch, No. 208,610, October 1, 1878; Bloom, No. 785,933, March 28, 1905; McCready, No. 1,522,197, January 6, 1925; and Cooper, No. 1,000,583, August 15, 1911.

to be controlled by a valve operated from above while the pipe is lowered or withdrawn. The importance of Franklin to this method claim is that he describes the use of a packer on a single string of pipe with a valve in the pipe in the very operation of putting them in and taking them out of the well. Franklin discloses a packer. Evidently one must be used for without it oil would not flow through the pipe as desired and there would be no use of the valve to control the flow. The packer is necessary to prevent escape of gas and to build up pressure to make the oil flow.

Franklin did not intend to get a sample by raising the pipe, but intended to keep from getting a sample by making the valve a leaky one that would let the contents escape as the pipe is raised. He expected to get what was below by natural flow just as Simmons, applicant for the patent in suit, says that is to be preferred. It would be no invention to substitute a valve that would not leak for one that was intended to and does leak on withdrawal. It would be no invention to use the Franklin device to sample a well instead of using it to flow the well. Especially after the disclosure of Cox and Edwards in the art of testing by sample taken through the drill stem with their somewhat complicated devices, recurrence for this new use to what is in substance the simple apparatus of Franklin ought not to be the foundation for the broad method claims here put forth. While perhaps not anticipated, they involve no such invention as entitles to monopoly.

The apparatus claims have a different status. They propose a new machine to better accomplish the useful result. They were rewritten to state for the first time that only a single string of pipe is to be used. In view of the oil well art, the omission of the Edwards second pipe to maintain circulation involves no such invention as to give a monopoly of all single string testers as is here

claimed. It may be a simplifying improvement on which to rest a combination patent but it is not a basic and pioneer invention. Positive pressure of the packer against the well walls, also written into the claims, appears to refer to the weight of the pipe on the rat-hole packer, but that is the way a rat-hole packer has always worked. The claims in suit can not be sustained in all their breadth but must be limited to the form of the apparatus disclosed.

The circuit court of appeals for the ninth circuit, upon considerations in substance the same as those suggested in the opinion of the circuit court of appeals for the fifth circuit, held that the apparatus claims of the patent in suit were anticipated by the patent to Franklin. But, holding that invalidity of apparatus claims does not negative discovery of method or process, that court in substance said:

The Franklin patent directs the pipe to be lowered into the well and the valve to be operated by movement of the pipe so as to control the flow of oil. It teaches that the tube can be kept empty by closing the valve while it is being lowered and that it should be closed prior to its removal. The device is to be used in a flowing well which, of course, contains no drilling fluid. At the time of that patent the rotary method of drilling was unknown. Its purposes were to provide a method of keeping the tubing closed while being lowered into or removed from the well and means of temporarily closing the tubing to allow the gas in the well to obtain sufficient head so that the well would flow. There is disclosed no use for taking entrapped samples from unfinished wells containing drilling fluid. There is no suggestion of this last step of the patented process; the device was evidently intended to be permanently attached to the tubing of the well.

Simmons, applicant for the patent in suit, faced the problem of providing a method of testing an oil well with-

out removing hydrostatic pressure necessary for support of the formation in question. He met it by a method operating so quickly that the suspension of the circulation of drilling fluid was not substantially greater than that frequently necessary in drilling operations. Franklin neither considered nor solved this problem.

The Simmons discovery constituted invention. It disclosed what had not been thought possible in the art, that is, that such a device could be set in a well containing drilling fluid not in circulation long enough to make the test; it substituted a much better process than had been in use. The discovery was that a well could be safely tested by lowering a single string of pipe equipped with a valve packer and strainer and that it was not necessary to set the casing permanently and bail out the drilling fluid; or, if a test were attempted without permanently setting the casing, it was not necessary to provide an extra string of pipe for circulation of the drilling fluid.

1. Plaintiffs, insisting that the apparatus claims are not invalid for lack of invention, emphasize the fact that the Franklin apparatus was intended to be used to govern flow of a finished well and not for testing productivity of formations encountered in drilling; they maintain that it is not adapted to the last mentioned use without significant changes and they suggest that even a very slight change is enough to give patentability to the changed apparatus if the change is foreign to the purposes of the Franklin apparatus and dictated by those of the apparatus in suit. They say that the essential features of the latter, not found in the Franklin patent, are a packer so related to the inlet that it may seal off the formation to be tested from the hydrostatic pressure of the mud-laden fluid standing in the well during the testing operation, a valve so positioned with respect to the packer inlet that when closed it will entrap the entire flow of the cognate fluid to result from natural pressure in the formation

when relieved from pressure of the drilling fluid, and so constructed that it will hold and bring to the surface the entrapped sample uncontaminated and undiminished.

The specification of Franklin's patent states that his invention consists in providing a device which can be connected with the tubing of the well above a "packer." On ample evidence, the trial and appellate courts found that packers to separate the producing strata from the others were old in the art, and that the use of a packer, substantially as the same exists today, is necessarily implied from the language of the Franklin patent. Detailed description by Franklin was unnecessary. *Loom Co.* v. *Higgins,* 105 U. S. 580, 586.

Franklin's specification states that the device containing the valve should be "preferably . . . above the packer" and that "it may be placed deep in the well and thereby obtain considerable advantage." This indicates a valve just above the packer as is true with respect to the patent in suit. But even assuming the contrary, in view of prior art as disclosed by the Cox and Edwards patents, the location of the valve as indicated by the patent in suit is mere mechanical contrivance and not invention. *Hollister* v. *Benedict & Burnham Mfg. Co.,* 113 U. S. 59, 73.

It is assumed, as claimed by plaintiffs, that the valve of the Franklin device was made so that it would let the contents of the pipe escape while it was being taken out of the well. But by mere substitution of a tight valve for a leaky one the device would be made to hold and bring up samples from the formation below the packer. The difference between the Franklin valve, leaking while being drawn from the well, and that of the patent in suit, purposely made to close tightly, is not an essential or patentable element.

In wells where there exists natural pressure in the formation below the packer sufficient to force the fluid to

the surface, either device, the Franklin or the one in suit, may be used to control flow of the well and so disclose the productivity of that stratum. It is equally plain that, in the absence of adequate pressure to carry to the surface, the Franklin device with a valve effectively closed would, if operated in accordance with the method claimed in the patent in suit, similarly receive, hold, and bring to the surface samples from the formation.

The apparatus claims are invalid.

2. As used in the statute,[8] "useful art" includes method which in this case is used interchangeably with process; "machine" includes apparatus.[9] Having held the apparatus not new, we come to the question whether claims 8 and 18 cover any new method or process.[10] These claims relate to "a method of testing." The claims relating to the device call it an "apparatus for testing." In the method claims [11] and in some relating to apparatus,[12] the phrases just quoted are followed by identical words: "the productivity of a formation encountered in a well containing drilling fluid." [13] The elements to be employed in taking the steps constituting the method are essentially the same as those constituting the apparatus. The process consists of "lowering an empty string of pipe," "setting the packer," "opening the valved inlet," "closing the valved inlet," "raising the pipe so closed to remove an entrapped sample and the packer from the well." The result to be achieved by the method claimed to be new is precisely the same as that for the attainment of which the apparatus found to be old was contrived.

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[8] 35 U. S. C. § 31.

[9] *Corning* v. *Burden*, 15 How. 252, 267.

[10] See *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, 77, 79. *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 383. *Tilghman* v. *Proctor*, 102 U. S. 707.

[11] Claims 8 and 18.

[12] Claims 13, 14, 15, 16, 17, 19.

[13] Footnote on opposite page.

[13] To show identical subject matter in the two sets of claims, defendants present an analysis of method claim 18 and apparatus claim 19 in parallel arrangement as follows:

18.	19.
A method of testing the productivity of a formation encountered in a well containing drilling fluid involving	An apparatus for testing the productivity of a formation in a well containing drilling fluid, comprising
the insertion of *only a single string of pipe* into the well to make a test,	*a string of pipe*
which includes lowering *a test string* into the well through the drilling fluid	[*a string of pipe*] to be lowered into the well through the drilling fluid to adjacent the formation . . . and to be raised out of the well to remove the entrapped sample, . . .
with *a packer* carried by the *string* and a *valve inlet* at the lower end of the *string* closed against the entrance of fluid from the well,	*a packer* carried by *the pipe* as the pipe is lowered into the well . . . *an inlet* to *the pipe* communicating with the well below the point at which the *packer* seals off the well,
setting *the packer* above the formation . . .	[*the packer is*] adapted to be seated by manipulation of *the pipe* to seal off the well above the formation, *said packer* adapted to be positively pressed against the walls of the formation to seal off the same,
closing *the valve* to prevent the subsequent entrance of fluid from the well through *the inlet* and releasing *the packer*, and raising the test string with the inlet closed against entrance of fluid from the well to remove an entrapped sample.	and means for controlling *the inlet* to permit fluid from the formation to enter *the pipe* while *the packer* is set and to prevent fluid from entering *the pipe* after *the packer is released* and *the pipe* is being raised out of the well [to remove the entrapped sample].

As already shown the Franklin apparatus served to bring out uncontaminated the oil yielded by the stratum below the packer. The method practiced by its use includes in the same order all the steps, except the last one, that constitute the process in question. That step is the raising of the pipe containing the entrapped sample. As the Franklin device was to control flow and not to test productivity of strata reached before completion of wells, the final movement to be taken in the process under consideration was not involved or described. But that movement is substantially disclosed by the Cox and Edwards patents. No discussion, in addition to the convincing exposition by the circuit court of appeals for the fifth circuit, is required to show that the method claimed in suit was clearly indicated in the prior art. It cannot reasonably be held that anything more than mechanical skill of men familiar with known methods of obtaining oil from formations below packers would be required to suggest the raising of the pipe containing fluid entrapped and held by effective closing of the valve.

The method claims are invalid.

The part of the decree of the circuit court of appeals brought up by defendants' petition is reversed. The part brought up by plaintiffs' petition is affirmed. The decree of the district court is affirmed.

No. 466, reversed.
No. 479, affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

Syllabus.

ATLAS LIFE INSURANCE CO. *v.* W. I. SOUTHERN, INC.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 598. Submitted March 29, 1939.—Decided April 17, 1939.

1. In Oklahoma, an insurer may set up fraud in the procurement of a policy as a defense to an action at law upon it, or may interpose a cross-complaint in that action for cancellation of the policy. P. 567.
2. An action in a state court of Oklahoma by a Delaware corporation against an Oklahoma insurance company upon a policy of insurance is not removable to the federal court, since the defendant is not a nonresident of Oklahoma within Judicial Code, § 28. P. 567.
3. The "jurisdiction" of suits in equity, conferred on the federal courts by Judicial Code, § 24 (1), is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. P. 568.
4. The provision of Judicial Code, § 267, that suits in equity shall not be maintained in the federal courts in any case where a "plain, adequate and complete remedy may be had at law," which continues, in substance, § 16 of the Judiciary Act of 1789, is but a declaration of the equity rule established long before the enactment of the Judiciary Act, and it serves by emphasis of the rule to protect the States from the encroachments which would result from the exercise of equity powers by federal courts failing to observe it. P. 569.
5. The accepted test of legal adequacy which the section prescribes is the legal remedy which the federal, rather than state, courts afford. P. 569.
6. Though the federal court have jurisdiction, in the sense of power to hear and decide the cause, and there is an absence of legal remedy, the right to equitable relief nevertheless depends upon allegation and proof of a cause of action in equity. P. 569.
7. The fact that an "incontestable" clause in a policy would soon come into operation is not necessarily ground for resort to equity in the federal court, when a suit at law is pending in a state court wherein the ground for equitable relief can be set up as a defense.

The federal court should proceed only so far as is necessary to protect the suitor from loss of his defense at law. P. 572.

8. Questions certified by the Circuit Court of Appeals to this Court in a suit by an insurance company for cancellation of policies of insurance on the ground of fraud in procurement, seeking instructions as to the right of the insurer to equitable relief in view of the pendency in the state court of an action at law previously brought on the policies by the beneficiary, *held* not appropriately framed for proper answer, because the facts certified fail to show whether the insurance company is entitled to the relief sought. P. 571.

The questions suggested may be properly answered only by reframing them or giving qualified answers to them. This the Court is not required to do, and can not properly do without recourse to the record, which in this case is not here.

9. It is inappropriate on certificate to answer questions which may be affected by unstated matter lurking in the record, or questions which admit of one answer under one set of circumstances and a different answer under another, neither of which is inconsistent with the certificate. P. 573.

CERTIFICATE from the Circuit Court of Appeals upon an appeal from a decree dismissing a bill in equity for cancellation of policies of insurance.

Messrs. Logan Stephenson and *Elmer J. Lundy* submitted for the Atlas Life Insurance Co.

The first question certified should be answered in the negative; the second in the affirmative. *Arrowsmith* v. *Gleason,* 129 U. S. 86; *Smyth* v. *Ames,* 169 U. S. 466; *Chicago, B. & Q. Ry. Co.* v. *Osborne,* 265 U. S. 14; *Risty* v. *Chicago, etc., Ry. Co.,* 270 U. S. 378; *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121; *Di Giovanni* v. *Camden F. Insurance Assn.,* 296 U. S. 64; *Petroleum Exploration, Inc.* v. *Public Service Comm'n,* 304 U. S. 209.

Even where an action by the insured is pending in the federal court, to which the Insurance Company may file an answer setting up the fraud as a defense, the federal court may have equity jurisdiction of a suit to cancel the policies because of the fraud. *American Life Insur-*

ance Co. v. *Stewart,* 300 U. S. 203; *Ruhlin* v. *New York Life Insurance Co.,* 93 F. 2d 416; *Stewart* v. *American Life Insurance Co.,* 89 F. 2d 743; *Davis* v. *Wakelee,* 156 U. S. 680, 688.

The third question should be answered in the affirmative.

The bill in equity was filed only five days before the expiration of the two-year period within which the Insurance Company had to initiate its contest. In the case of *American Insurance Co.* v. *Stewart, supra,* the suits were filed "one year, five months and twenty days" prior to the expiration of the period, and this fact was emphasized by the Circuit Court of Appeals of the Tenth Circuit in the two opinions preceding the decision in this Court. See *Stewart* v. *American Life Insurance Co.,* 80 F. 2d 600, 601; 85 F. 2d 791, 792.

The section of the federal statutes which prohibits the maintenance of a suit in equity where an adequate remedy at law is available should not be held to mean that one may not maintain a suit in equity if he has an opportunity to interpose a defense at law. *Phoenix Mutual Life Insurance Co.* v. *Bailey,* 80 U. S. 616; and *Cable* v. *United States Insurance Co.,* 191 U. S. 287, distinguished. See *Harnischfager Sales Corp.* v. *National Life Insurance Co.,* 72 F. 2d 921.

The insured died just eighteen days before the period of contestability expired. This right of the Insurance Company to invoke the equitable jurisdiction of the federal court means nothing to it if the adversary, at his own will, may determine whether that court will proceed to hear the complaint. Cf. *Southern Pacific Co.* v. *Corbett,* 20 F. Supp. 940; *Arrowsmith* v. *Gleason, supra; Payne* v. *Hook,* 74 U. S. 425. The federal court was bound to take the case; it could not abdicate its authority or duty in favor of the state jurisdiction. *Kline* v. *Burke Construction Co.,* 260 U. S. 226.

Mr. Austin Flint Moss submitted for W. I. Southern, Inc.

Mr. Justice Stone delivered the opinion of the Court.

In this case the Court of Appeals for the Tenth Circuit has certified to us questions of law concerning which it asks instructions for the proper decision of the cause pending in that court. Judicial Code, § 239; 28 U. S. C. § 346.

The certificate states that on March 13, 1936, Atlas Life Insurance Company, an Oklahoma corporation, plaintiff below, issued, on a single application, three policies of insurance on the life of one Southern, in amounts of $10,000, $15,000 and $25,000 respectively, each naming as beneficiary W. I. Southern, Inc., a Delaware corporation. All of the policies contained an incontestable clause reading:

"This policy will be incontestable after two years from date of issue except for the nonpayment of premium and except as to provisions and conditions relating to disability benefits and those granting additional insurance specifically against death by accident, if any",

and a clause relating to statements of the insured in his application as follows:

"All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it be contained in the written application and a copy of the application is endorsed upon or attached to this policy when issued."

The insured died February 23, 1938, and on March 7, 1938, the corporate beneficiary began suit against the insurance company in the Oklahoma state district court. On the following day the insurance company brought a suit in equity against the beneficiary in the federal district court for northern Oklahoma for cancellation of the

policies, on the ground that in his application the insured had intentionally and fraudulently given false answers to questions material to the risk. The trial court sustained a motion to dismiss the equity suit, made on the ground that the insurance company had an adequate remedy at law by setting up the alleged fraud as a defense to the action pending in the state court. 23 F. Supp. 334. The insurance company electing not to plead further, a decree was entered dismissing the bill, from which the insurance company appealed to the Circuit Court of Appeals.

Under the Oklahoma practice the insurance company can set up the fraud as a defense to the action at law on the policies, or can interpose a cross-complaint in that action for cancellation of the policies. *Farmers & Merchants Bank* v. *Hoyt,* 29 Okla. 772; 120 P. 264. The action on the policies in the state court is not removable by the insurance company, since it is not a non-resident of Oklahoma within the meaning of § 28 of the Judicial Code, 28 U. S. C. § 71.

The questions certified are as follows:

"1. Is the remedy at law available in the state court by setting up the alleged fraud as a defense to the action on the policies, such an adequate remedy at law as will constitute a valid defense to the suit in equity for cancellation of the policies?

"2. In order to constitute a defense to a suit in equity to cancel a policy of life insurance on the ground of fraud, is it essential that the remedy at law be available to the complainant in an action at law pending in the federal court?

"3. Is the principle that the adequate remedy at law which will preclude a federal court of equity from granting relief must be one available in the federal courts, applicable in the instant case where the relief sought is affirmative in form but defensive in character?"

Section 11 of the Judiciary Act of 1789, 1 Stat. 78, provided that the circuit courts should have "cognizance . . . of all suits of a civil nature at common law or in equity" in cases appropriately brought in those courts. This provision is perpetuated in § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1), which declares that the district courts shall have jurisdiction of such suits. The "jurisdiction" thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. *Payne* v. *Hook,* 7 Wall. 425, 430; *In re Sawyer,* 124 U. S. 200, 209–210; *Matthews* v. *Rodgers,* 284 U. S. 521, 525; *Gordon* v. *Washington,* 295 U. S. 30, 36. This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity. See *Massachusetts State Grange* v. *Benton,* 272 U. S. 525, 528; *Pennsylvania* v. *Williams,* 294 U. S. 176, 181, and cases cited.[1]

[1] Unlike the objection that the court is without jurisdiction as a federal court, see *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382, the parties may waive their objections to the equity jurisdiction by consent, *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380; *Re Metropolitan Railway Receivership,* 208 U. S. 90; cf. *Marin* v. *Augedahl,* 247 U. S. 142, or by failure to take it seasonably. *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 535–536; *Southern Pacific R. Co.* v. *United States (No. 1),* 200 U. S. 341, 349. The objection should be taken by the court *sua sponte,* when obvious, *Lewis* v. *Cocks,* 23 Wall. 466, 470; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481, 484, or when the exercise of the equity

Section 16 of the Judiciary Act of 1789, 1 Stat. 82, continued without material change as § 267 of the Judicial Code; 28 U. S. C. § 384, declares that suits in equity shall not be sustained in the courts of the United States in any case where a "plain, adequate and complete remedy may be had at law." The command of § 267 is but a declaration of the equity rule established long before the enactment of the Judiciary Act, and it serves by emphasis of the rule to protect the states from the encroachments which would result from the exercise of equity powers by federal courts failing to observe it. *Matthews* v. *Rodgers, supra,* 525; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 284 U. S. 530.

By long-settled construction, the accepted test of legal adequacy which the section prescribes is the legal remedy which the federal, rather than state, courts afford.[2] *Smyth* v. *Ames,* 169 U. S. 466; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378, 388; *Di Giovanni* v. *Camden Fire Insurance Assn.,* 296 U. S. 64; *Petroleum Exploration, Inc.* v. *Public Service Comm'n,* 304 U. S. 209, 217. But although the adequacy of the legal remedy precludes resort to a federal court of equity, it does not follow that the converse is true—that the want of a legal remedy in the federal courts gives the suitor free entrance to a fed-

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powers of the federal court affects the relationship of the federal to the state courts. See *Kennedy* v. *Tyler,* 269 U. S. 13; *Matthews* v. *Rodgers,* 284 U. S. 521, 525–526; *Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *Di Giovanni* v. *Camden Fire Insurance Assn.,* 296 U. S. 64, 73. Cf. *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 271–273.

[2] "Otherwise the suitor in the federal courts might be entitled to a remedy in equity which the federal courts of law are competent to give, or, on the other hand, be obliged to forego his right to be heard in the federal courts in order to secure an equitable remedy which state courts of law do but the federal courts of law do not give. See *Stratton* v. *St. Louis Southwestern Ry.,* 284 U. S. 530, 533, 534; . . ." *Di Giovanni* v. *Camden Fire Insurance Assn.,* 296 U. S. 64, 69.

eral court of equity. Absence of legal remedy does not dispense with the necessity of alleging and proving a cause of action in equity as a prerequisite to equitable relief in a federal court. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *Di Giovanni* v. *Camden Fire Insurance Assn., supra; American Life Ins. Co.* v. *Stewart,* 300 U. S. 203.

The insurance company in the circumstances disclosed by the certificate is without remedy in a suit at law. The federal courts can render no judgment at law directing cancellation of a contract for fraud in its inception or preserving evidence of the fraud. These are forms of relief which a court of equity alone can give. But the basis of equitable relief is that the cancellation asked is necessary to protect the suitor from irreparable injury when there is manifest danger that his defense at law on the policy will be lost or prejudiced. *Enelow* v. *New York Life Ins. Co., supra; Di Giovanni* v. *Camden Fire Insurance, Assn., supra; American Life Ins. Co.* v. *Stewart, supra.*

Ordinarily when the defense of fraud may be interposed to an action at law on the policy and such an action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law. In such a case the bill is dismissed without prejudice, not because there is want of jurisdiction in the federal court, but because the plaintiff has made no case for equitable relief. *Insurance Co.* v. *Bailey,* 13 Wall. 616; *Cable* v. *United States Life Ins. Co.,* 191 U. S. 288; *Enelow* v. *New York Life Ins. Co., supra; Di Giovanni* v. *Camden Fire Insurance Assn., supra.* And since the issue is not one of jurisdiction but of the need and propriety of equitable relief, the mere fact that the suit at law which is imminent can be brought only in the state court, or that it is pending there, is immaterial. *Cable* v. *United States Life Ins. Co.,*

supra; Di Giovanni v. *Camden Fire Insurance Assn., supra;* cf. *Insurance Co.* v. *Bailey, supra.* It is no ground for equitable relief that the suit at law is brought in a state rather than a federal court, for the insurance company's defense may be protected there as well as in a federal court, and in that case there is no threat of irreparable injury. See *Cable* v. *United States Life Ins. Co., supra.* On comparable grounds a federal court may withhold its aid when a plaintiff has failed to resort to a state administrative remedy. *Natural Gas Pipe Line Co.* v. *Slattery,* 302 U. S. 300, 310–311. Only when special circumstances are shown which subject the insurer to the hazard that his defense to the suit at law, whether in the state or federal court, will be lost or prejudiced is there occasion for equity to give relief. *American Life Ins. Co.* v. *Stewart, supra.*

In the light of what we have said it is evident that the certified questions cannot be properly answered, both because they are apparently framed without reference to the requirements for the maintenance of a suit in equity in the federal courts independently of § 267 of the Judicial Code and on the mistaken assumption that that section affords the only test of the insurance company's right to proceed in a federal court of equity; and because the certificate does not exclude the possibility that there are facts, lurking in the record or within the range of judicial notice, which may have a material bearing on the insurance company's need for equitable relief.

Since the insurance company has no remedy at law in the federal courts for the cancellation of the policies, § 267 interposes no obstacle to a suit in equity in a federal court. But it is requisite under § 24 (1) of the Judicial Code to the maintenance of suit there that facts should be presented entitling the company to equitable relief. In this aspect of the case the certified questions are incapable of categorical answer and the questions which

they suggest can be properly answered only by reframing the questions certified or giving qualified answers to them. This we are not required to do, see *Jewell* v. *Knight,* 123 U. S. 426, 432, 435; *Chicago, B. & Q. Ry. Co.* v. *Williams,* 205 U. S. 444; *United States* v. *John Barth Co.,* 276 U. S. 606; *White* v. *Johnson,* 282 U. S. 367, and cannot properly do without recourse to the record, which is not before us.

The suit at law in the state court in this case was brought shortly before the expiration of the two year period after which the incontestable clause, according to its terms, would come into operation. The fact that that period was about to expire was thought to be a sufficient ground for resort to equity in *American Life Ins. Co.* v. *Stewart, supra,* where no suit at law was pending or appeared to be imminent when the bill was filed. But we cannot say, at least without qualification, that a complainant similarly sustains the burden of showing threatened irreparable injury when a suit at law is pending in which he is free to set up as a defense the fraud on which he must rely in a cancellation suit in equity. Whether there are other special circumstances in the present case entitling the insurance company to equitable relief; whether there are peculiarities of local procedure which, in some circumstances, might impair the insurance company's defense; whether such circumstances exist; or whether, under local law, a defense once interposed before the policy has become incontestable is a "contest" sufficient to preserve the insurer's rights for all purposes, see *New York Life Ins. Co.* v. *Hurt,* 35 F. 2d 92, 95; *Harnischfeger Sales Corp.* v. *National Life Ins. Corp.,* 72 F. 2d 921, 922; *Killian* v. *Metropolitan Life Ins. Co.,* 251 N. Y. 44, 48; 166 N. E. 798, are questions which the certificate does not exclude from the case and which have not been briefed or argued here. Yet they are questions which may require consideration before a court can determine whether

the equity suit should be dismissed or whether the bill should be retained without further proceedings pending disposition of the suit at law, as may be done by the equity court in its discretion. *Landis* v. *North American Co.*, 299 U. S. 248; *American Life Ins. Co.* v. *Stewart*, *supra*, 215. The guiding principle is that the federal court should proceed only so far as is necessary to protect the suitor from loss of his defense at law, without needlessly interfering with the determination of the plaintiff's rights in the state court, where his action was properly begun. See *Di Giovanni* v. *Camden Fire Insurance Assn.*, *supra*, 73, and cases cited.

The certificate fails to disclose whether all the facts and circumstances pertinent to this issue have been certified. This Court cannot be required by certificate to answer, and should not answer, questions which may be affected by unstated matter lurking in the record, or questions which admit of one answer under one set of circumstances and a different answer under another, neither of which is inconsistent with the certificate. See *Triplett* v. *Lowell*, 297 U. S. 638, 648, 649.

The certificate is

Dismissed.

WILENTZ ET AL. *v.* SOVEREIGN CAMP, WOODMEN OF THE WORLD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 448. Argued March 2, 1939.—Decided April 17, 1939.

1. The requirement of Judicial Code, § 266 that the three judge court procedure there prescribed with direct appeal to the Supreme Court may be invoked only when the suit is one to restrain the action of state officers in the enforcement or execution of a state statute, or in the enforcement or execution of an order made by an administrative board or commission, is a requirement of substance, not

of form, and it is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute or order. P. 579.

2. The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the statute, can not properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of state officers in enforcing or carrying into effect a challenged state statute of general application. P. 582.

3. The New Jersey Municipal Finance Commission Act, as amended, provides a scheme for the management of the affairs of any municipality found by the state supreme court to be unable to meet its obligations when due by a commission composed of state officers acting in conjunction with the municipal authorities. The Act provides that, where the Commission shall function in any municipality or coterminous school district, all suits to recover upon school bonds, and execution on judgments in such suits, shall be stayed, except when such proceedings may be authorized by the state supreme court under conditions calculated to secure equality to all creditors. Also, the governing body of a district in which the Commission is functioning is authorized to compromise delinquent taxes, except claims in excess of $500, which may not be compromised without the written assent of the Commission. Assailing the stay and compromise provision of the Act as violative of the contract clause of the Federal Constitution, a creditor who had recovered a judgment on previously acquired school bonds brought suit to restrain the Commission from functioning in the municipality and from assenting to the compromise of delinquent taxes due the municipality and to restrain the local tax collector from carrying into effect any such compromise. *Held:*

(1) The suit was not maintainable under Judicial Code § 266, and this Court was without jurisdiction of a direct appeal thereunder. P. 582.

(2) As the prescribed stay becomes effective by virtue of the statute whenever the state supreme court finds that the municipality is unable to meet its obligations, the Commission is without power to grant or withhold a stay, there is no occasion to enjoin action of the Commission as the means of preventing operation of the stay provision and the suit so far as it seeks to set them aside is not required by § 266 to be tried by a court of three judges. P. 580.

(3) The Commission is similarly without authority to enforce provisions of the statute authorizing municipal authorities to com-

promise delinquent taxes, and to consent to a compromise which it can not command is not an "order" within the meaning of § 266. P. 580.

(4) The injunction sought to restrain the Commission from assenting to compromises of delinquent taxes arranged and to be carried into effect by local officers is but incidental to the purpose of the suit to prevent the performance by local officers of a local function, and such a suit is not to be brought within the purview of § 266 by the expedient of adding as nominal parties the members of the Commission who are state officers but whose presence is not necessary to prevent operation of the challenged statute, and whose only action is the approval of that of local officers to be taken under the statute. P. 581.

4. Although without jurisdiction to hear the merits of the appeal under § 266, this Court in the exercise of its appellate jurisdiction may give directions appropriate to enforce the limitations of that section; and where the appellants have already taken an appeal from the decree below to the Circuit Court of Appeals, their remedy will be preserved by simply dismissing the appeal taken to this Court. P. 582.

23 F. Supp. 23, appeal dismissed.

APPEAL from a decree of the district court of three judges holding a state statute unconstitutional and granting relief by injunction against certain public officers acting pursuant to it.

Mr. E. J. Dimock, with whom *Messrs. William A. Stevens, S. Lewis Davis,* and *Frank T. Lloyd* were on the brief, for appellants.

Even if the stay provisions and the provisions for acceptance of bonds in payment of taxes were unconstitutional, the three-judge court was without jurisdiction because no substantial case was made out for an injunction against state officers in the enforcement of such provisions.

If there was any reason for asking an injunction against the Municipal Finance Commission, which can merely consent to compromises, there would be much greater reason for seeking an injunction against the body which arranges

the compromises. An injunction against the Commission's consenting to that practice would add nothing. The Commission is, therefore, a completely unnecessary party in this proceeding and its presence in the case as the object of a prayer for an injunction against its consenting to bond settlements should not have availed to oust the one-judge district court of jurisdiction.

It is settled that a mere nominal joinder of state officials as defendants in a case where the substantial relief sought is an injunction against local officials does not require the convening of a three-judge court. *Pleasant* v. *Missouri-Kansas-Texas Ry.*, 66 F. 2d 842; certiorari denied 291 U. S. 659.

Messrs. David M. Wood and *Arthur T. Vanderbilt* for appellee.

Respecting the stay provisions of the statute, appellants assume that, because the injunction granted was narrower than the prayer, the court lost all jurisdiction of the case, despite the presence of the essential jurisdictional elements in the complaint. It is definitely established that a three-judge court once having obtained jurisdiction by the presence of a substantial federal question, can give relief upon a non-constitutional ground or rest its decision solely on the basis of a local issue, without even passing upon the federal questions. *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298; *Davis* v. *Wallace,* 257 U. S. 478; *Sterling* v. *Constantin,* 287 U. S. 378; *Glenn* v. *Field Packing Co.,* 290 U. S. 177; *Lee* v. *Bickell,* 292 U. S. 145; *Railroad Commission* v. *Pacific Gas & Electric Co.,* 302 U. S. 388.

The consent of the Commission is vital to the compromise of taxes and acceptance of bonds in payment thereof. By enjoining them from assenting on the ground of unconstitutionality of the statute and action thereunder, the

unlawful practice is stopped at the proper place—the spot where the ultimate authority lies. In fact, if any party might be omitted from the injunction, it would be the tax collector and not the Commission, for he may only act after the latter has approved. *Norfolk & Western Ry. Co.* v. *Board of Public Works,* 3 F. Supp. 791.

Mr. Justice Stone delivered the opinion of the Court.

The question is whether we have jurisdiction to consider the merits of this appeal taken under § 266 of the Judicial Code directly to this Court from the decree of a district court of three judges.

Appellee brought the present suit in equity in the District Court for the District of New Jersey, praying a declaratory decree against the validity of certain provisions of the New Jersey Municipal Finance Commission Act, c. 340, New Jersey Laws of 1931, as amended, and an injunction restraining state and municipal officers from acting pursuant to the Commission Act, on the ground that it impairs the obligation of contract in violation of the federal Constitution by depriving appellee of the remedies existing when the contracts were entered into. The Commission Act provides an elaborate scheme for the control and management of the affairs of any municipality, found by the Supreme Court to be unable to meet its obligations when due, by a commission composed of state officers acting in conjunction with the local municipal authorities. The Act, in its amended form, appears in Title 52, c. 27, §§1 to 66, inclusive, c. 24, § 19.1, c. 14, § 32, Title 1, c. 1, § 10, Revised Statutes of New Jersey, 1937.

Appellants, members of the Municipal Finance Commission, and the other appellants, members of the Board of Assessors of the Borough of Runnemede, a New Jersey municipal corporation, and its Tax Collector, were joined

as defendants. Decision on an application for an interlocutory injunction, presented to the district court of three judges assembled pursuant to § 266 of the Judicial Code, and also on a motion of appellants to remit the case to a single district judge, was reserved, and the court, after hearing, rendered its final decree sustaining appellants' contention that the challenged statute was unconstitutional and granting relief by injunction against all the appellants. The case comes here on appeal under §§ 238 and 266 of the Judicial Code. 28 U. S. C. §§ 345, 380.

Appellants press here the objection made below that the case is not one for a court of three judges as prescribed by § 266 of the Judicial Code, and that consequently this Court is without jurisdiction to pass on the merits of the appeal taken directly from the district court, a contention which requires our consideration of the nature of the cause of action and of the relief sought and awarded. See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386.

The bill of complaint states that appellee, a fraternal benefit life insurance association, organized under the laws of Nebraska, purchased on June 1, 1930, school bonds issued by the Board of Education of the Borough of Runnemede, which is coterminous with the school district of Runnemede; that default having occurred in the payment of principal and interest on the bonds remaining unpaid, appellee brought suit upon them in a federal court and on December 5, 1935, recovered a judgment against the Board of Education in the sum of $21,776.21, execution upon which was returned unsatisfied; and that appellee then began in the federal district court for New Jersey a suit for mandamus, which is still pending undecided, to compel the proper officers of the Borough to assess and collect taxes for payment of appellee's judgment.

The bill of complaint further alleges that appellee's contract, acquired by the purchase of the bonds, has been impaired in violation of the contract clause of the Constitution (Art. I, § 10) by the later enactment of c. 195, and § 17 of c. 258, New Jersey Laws of 1935, which extended the stay provisions of the State Municipal Finance Commission Act (§§ 351, 352, 354, Municipal Finance Commission Act, as amended by §§ 8, 9, c. 330, New Jersey Laws of 1933, c. 191, New Jersey Laws of 1935) to a school district whenever the Commission shall function in a municipality which is coterminous with the school district. In that event § 17 stays suits and proceedings for recovery on school bonds of the municipality and stays execution on judgments in such suits, except that the Supreme Court or one of its justices is given discretionary power on application, prescribed by the statute, to authorize the suit to proceed, or execution to issue, under conditions calculated to secure equality of treatment of all creditors.

Section 103 of the Municipal Finance Act provides that upon petition of a municipality showing that it "is not in a position to meet its obligations when due," a justice of the Supreme Court is authorized to make an order to that effect, whereupon the "commission shall function" in that municipality "with all the powers and duties conferred by this act." It is alleged in the bill of complaint, and was found below, that a justice of the Supreme Court had determined that the Borough of Runnemede was unable to meet its obligations and that the Commission, pursuant to the statute, then commenced to function and has since functioned in the Borough and in its coterminous school district.

As a further impairment of appellee's contract the bill of complaint alleges that in 1930, when the school district bonds were issued, the statutes of New Jersey provided

that taxes levied on property within the state should be paid only in lawful money of the United States, but that § 6 of c. 330 of the New Jersey Laws of 1933 authorizes the governing body of a municipality in which the Commission is functioning to compromise and adjust delinquent taxes due the municipality, except claims for taxes in excess of $500, which may not be so compromised without the written assent of the Commission; that acting under these provisions the Commission has given its written assent to compromises previously authorized by the Runnemede Borough Council, whereby bonds were received in payment of taxes due the Borough in excess of $500, thus impairing the security and obligation of appellee's bonds.

The bill of complaint prays a judicial declaration that appellee's right to compel a levy and collection of taxes for the satisfaction of its judgment is governed by § 35 of the Execution Act of New Jersey, 2 Comp. Stat. of New Jersey, p. 2255, and § 237 of the School Law of New Jersey, 4 Comp. Stat. of New Jersey, p. 4804, in force in 1930, when the school bonds were issued; that the statutes assailed, c. 330, New Jersey Laws of 1933, cs. 195 and 258, New Jersey Laws of 1935, all as amended and supplemented, be declared unconstitutional and void as infringing the contract clause; that the Commission be enjoined from functioning in the Borough of Runnemede and from assenting to the compromise of delinquent taxes of the Borough for any sum less than the full amount due, and that appellant Tax Collector be enjoined from carrying into effect any such compromise; that appellants, the Borough's Assessors and its Tax Collector, be enjoined from assessing and collecting taxes for the year 1936 without including in them the amount of appellee's judgment.

The trial court sustained the allegations of the bill by its findings and granted the relief prayed, except that it declined to enjoin any action by the Assessors and Col-

lector with respect to the assessment and collection of 1936 taxes. In enjoining the Commission from functioning in the Borough the court directed that its decree should be "without prejudice to any of the powers or duties of the Municipal Finance Commission under the Municipal Finance Commission Act except as the stays therein contained affect the right of the complainant to enforce its judgment." The decree in its practical operation thus enjoined no action by the Commission and amounted to no more than a declaration that the stay provisions of the challenged statute were invalid and unenforceable.

By § 266 of the Judicial Code, a suit in which application is made and pressed for an interlocutory injunction "restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission" is required to be heard by a court of three judges constituted as the section prescribes. The section also declares that "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." Our jurisdiction to hear the appeal on the merits, which is now challenged, turns upon the question whether the present is "such suit."

The reasons for the adoption of the extraordinary procedure prescribed by § 266 of the Judicial Code in the class of cases defined by it, and the rule that it may be invoked only when the suit is one to restrain state officers, have often been pointed out. *Ex parte Collins,* 277 U. S. 565; *Ex parte Public National Bank,* 278 U. S. 101; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra.* This requirement is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant,

state officers whose action is not the effective means of the enforcement or execution of the challenged statute. See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra,* 391.

By its terms § 266 embraces only those cases in which an interlocutory injunction is sought to prevent the operation of a state statute "by restraining the action" of a state officer "in the enforcement or execution of such statute." Here it appears on the face of the bill of complaint, and from the findings, that the statutes assailed as unconstitutional are those prescribing a stay of suit or execution against any municipality and its coterminous school district in which the commission is functioning, and also the statute which permits a compromise of delinquent taxes by such a municipality and school district. The only state officers against whom an injunction is sought are the members of the Commission. But they are clothed with no authority to enforce the challenged statutes and have taken no steps to enforce them. The stays prescribed by the statute become effective with respect to any particular municipality by virtue of other statutory provisions whenever the state Supreme Court finds that the municipality is unable to meet its obligations. The order of the Supreme Court promulgating its finding is the decisive action which calls the stay provisions into operation, and when that action is taken the statute becomes self-executing. The Commission is thus without power to grant or withhold a stay, and as the form of the decree, already noted, shows, there is no occasion to enjoin action by the Commission as the means of preventing operation of the stay provisions.

The Commission is similarly without authority to enforce the provisions of the Act of 1933, authorizing the compromise of delinquent taxes. Its written assent, prerequisite to execution of a compromise which the Commission cannot command, is not an order within the

meaning of § 266. *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172. The Borough Council, whose members are not state officers and are not parties to the present suit, is the exclusive agency for arranging the compromise. The effective agent for carrying the statute into execution is appellant Borough Tax Collector, who is not a state officer. The functions which the Council and the Collector perform, affecting the collection of taxes for payment of the local school district bonds, are not state, but local functions, and a suit for an injunction restraining such action by local officers is not within § 266. *Ex parte Collins, supra; Ex parte Public National Bank of New York, supra;* cf. *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89.

Even though the written assent of the Commission, without which there can be no compromise of tax claims in excess of $500, be said to be action in "execution" of the statute, we think this case is not one for a court of three judges, because the injunction sought against the Commission is but incidental to the sole purpose of the suit to prevent the performance by local officers of a local function. The members of the Commission are not necessary parties to the suit, and there is no occasion for relief against them in addition to that sought against the Collector. The Commission, in the performance of its statutory duty, acts only to approve the exercise by local officers of an authority conferred on them as such. A suit to restrain the latter from carrying into execution a state statute by performance of the local function which it authorizes is not to be brought within the purview of § 266 by the expedient of adding as nominal parties state officers whose presence is not necessary to prevent the operation of the challenged statute and whose only action is the approval of that of local officers to be taken under it. In such circumstances their presence in the suit generates no interest which it is the purpose of § 266 to

protect and must be regarded as colorable only for the purpose of securing the advantages of proceeding before a court of three judges, as was the presence of the state officers in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra,* where it was held that there was no appeal under § 266.

The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the statute, cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of state officers in enforcing or carrying into effect a challenged state statute of general application. *Ex parte Collins, supra; Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra,* 391. Here the issue is not one of jurisdiction of the district court as a federal court, see *Ex parte Poresky,* 290 U. S. 30, 31; *Healy* v. *Ratta,* 292 U. S. 263, but is whether a final hearing by three judges is prescribed by the section and hence whether this Court has jurisdiction to hear the appeal. *Smith* v. *Wilson,* 273 U. S. 388. As the case was not one for which a court of three judges is prescribed by § 266, no appeal lies to this Court and it is without jurisdiction to hear the merits of the appeal.

In the exercise of its appellate jurisdiction, this Court has authority to give such directions as may be appropriate to enforce the limitations of § 266, and may frame its mandate in such manner as will save to appellants their appropriate remedy by appeal to the proper court. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra; Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16. But as is indicated by the briefs, appellants have already taken an appeal from the decree below to the Court of Appeals for the Third Circuit, and it thus appears that their remedy will be preserved by dismissing the appeal to this Court without more.

The appeal will be dismissed with costs to appellants. See *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379,

387; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra.*

Appeal dismissed.

CLARK, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES, ET AL. *v.* PAUL GRAY, INC. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 534. Argued March 27, 1939.—Decided April 17, 1939.

1. The Court raises *sua sponte* the question whether jurisdictional amounts were in controversy in the District Court. P. 588.
2. When several plaintiffs assert separate and distinct demands in a single suit, the amounts involved can not be added together to satisfy jurisdictional requirements; jurisdiction as to each separate controversy depends upon the amount involved in that controversy. P. 589.
3. When several plaintiffs assert separate and distinct demands in one suit, a general allegation in the bill that the amount involved in the litigation is in excess of $3,000 and a finding of the District Court that the amount involved in the suit exceeds the jurisdictional amount, give no indication that the amount in controversy with respect to the claim of any single plaintiff exceeds the jurisdictional amount, and are insufficient to show that the District Court had jurisdiction of the cause. P. 589.
4. The amount in controversy in a suit to restrain illegal imposition of fees or taxes is the amount of the fees and taxes which would normally be collected during the period of the litigation. P. 589.
5. The question whether the jurisdictional amount was involved in the District Court is determined by the record of that court, which can not be supplemented by affidavits filed in this Court. P. 590.
6. A suit by several plaintiffs, each bound to establish the jurisdictional amount with respect to his own claim, should be dismissed as to those who fail to do so. P. 590.
7. The States have constitutional authority to exact reasonable fees for the use of their highways by vehicles moving interstate; and for that purpose they may classify the vehicles according to the character of the traffic and the burden it imposes on the State by

that use, and charge for the use a fee not shown to be unreasonable or excessive. P. 593.

8. Such classification is a legislative act and is presumed to be supported by facts known to the legislature, unless facts judicially known or proved preclude that possibility. P. 594.
9. In passing upon the validity of such a classification, the function of the court is to determine whether it is possible to say that the legislative decision is without rational basis. This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles using the state highways in interstate commerce. P. 594.
10. The Califorina "Caravan" Act of 1937, defining "caravaning" as the transportation of any vehicle operated on its own wheels, or in tow of a motor vehicle, for the purpose of sale, exacts two license fees, each of $7.50, for a six month's permit to "caravan" a vehicle on the state highways. One of the fees is declared to be to reimburse the State for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits, and pertaining to public safety upon the highways as affected by such operation; the other is declared to be compensation for the privilege of using the public highways. Vehicles moving wholly within either of two zones, which are approximately the northern and southern halves of the State, are excepted from the operation of the statute. *Held:*

(1) That the tax is not an unconstitutional burden on interstate commerce, nor an infraction of the due process and equal protection clauses of the Fourteenth Amendment, as applied to one engaged in the distinct business of bringing motor cars into the State for sale, in extensive caravans or convoys composed largely of cars coupled in twos, each pair in control of a single driver. Cf. *Morf* v. *Bingaman,* 298 U. S. 407. Pp. 594–595.

The evidence shows that coupled cars, under control of a single driver, subject the highways to increased wear and tear because of their tendency to skid and sway on curves and in passing other traffic, and that the length of the caravans and the inefficiency and irresponsibility of the drivers, casually employed, increase traffic congestion and the inconveniences and hazards of automobile traffic. These circumstances have caused the State to make increased provision for the policing of the traffic.

(2) One engaged in this class of highway traffic has no ground or status to complain of the discrimination involved in exacting the fees where cars are transported into the State for sale singly and

not where they move singly intrazone or enter the State not for purposes of sale. P. 595.

(3) No unconstitutional discrimination results from failure to apply the statute to cars that move for sale intrazone in caravans, it appearing that cars in that class are driven relatively short distances, over highways of more than two lanes, as distinguished from caravans coming from without the State, which move for long distances over two-lane highways in mountain districts; that such intrazone caravans or convoys as there are consist of two to four cars; that coupling is negligible; that each car is in charge of a regularly licensed driver; and that such intrazone movement is subject to other licensing and taxing provisions, the differences between which and the exactions here in question may bear a fair relation to the differences in the burden of the traffic for which the State must provide. P. 596.

(4) The legislature having made its classification by the establishment of zones, in the light of special conditions in the State, courts are not free to set aside its determination unless they can say that it is without any substantial basis. P. 596.

(5) The complainant has not sustained the burden of proving, and the evidence does not show, that the fees exacted by the statute are excessive, for the purposes indicated. P. 600.

23 F. Supp. 946, reversed.

APPEAL from a final decree of the District Court of three judges which enjoined the appellants, officers of the State of California, from enforcing statutory provisions imposing license fees for the use of the state highways in the transportation for sale of motor vehicles in "caravans."

Mr. Amos M. Mathews, with whom *Messrs. Earl Warren,* Attorney General of California, and *Frank W. Richards* and *James H. Oakley,* Deputy Attorneys General, were on the brief, for appellants.

Mr. Everett W. Mattoon for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

The principal questions for decision are whether the California Caravan Act of 1937, exacting fees aggregating

$15 for each automobile driven into the state for sale, imposes a forbidden burden on interstate commerce or infringes the due process or equal protection clauses of the Fourteenth Amendment.

This is an appeal under §§ 238 (3), 266 of the Judicial Code; 28 U. S. C. §§ 345 (3), 380, from a final decree of the district court for southern California, three judges sitting, enjoining appellants, officers of the State of California, from enforcing the license and fee provisions of Chapter 788, p. 2253, California Statutes of 1937. *Gray v. Ingels*, 23 F. Supp. 946.[1]

The statute, known as the Caravan Act, was enacted as a substitute for the Caravan Act of 1935, c. 402, Cal. Stat. 1935, held invalid in *Ingels* v. *Morf*, 300 U. S. 290, as an infringement of the commerce clause. "Caravaning" is defined in § 1 of the present Act as the "transportation of any vehicle . . . operated on its own wheels, or in tow of a motor vehicle, for the purpose of selling or offering the same for sale . . . within or without this State." Sections 4, 5 and 6 exact in lieu of all other fees two license fees, each of $7.50, for a six-months permit for caravaning a vehicle on the state highways. One of these is "to reimburse the State for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation"; the other is declared to be "compensation for the privilege of using the public highways." Section 8 exempts from the

[1] The suit was begun July 14, 1937, before the enactment of the amendment to § 24 of the Judicial Code; Act August 21, 1937, c. 726, 50 Stat. 738, providing that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." Section 2 of the Act exhibits from its operation suits begun in the district courts before its enactment.

operation of the same vehicles moving wholly within either of two areas which are approximately the northern and southern halves of the state. Other sections of the Act make provision for the issuance of licenses and the collection of fees. Section 12 provides for the collection of fees by seizure and sale of vehicles transported in violation of the Act, and § 13 prescribes criminal penalties for violation.

Appellee, numerous individuals, organizations and corporations, joined in bringing the present suit against appellants, state officers charged with the duty of enforcing the Act, alleging that each appellee had driven and would in the course of business drive commercial vehicles into California for the purpose of sale. They prayed an injunction restraining appellants from enforcing the Act and enjoining the provisions of the statute in aid of their collection. The district court's findings state that the amount involved in the action is in excess of the sum of $3,000; that each of appellees in the course of business of selling motor cars purchases car previously registered in other states and "caravans" them into the State of California; that cars for sale are often moved between points in a state zone; that the operation of cars in caravans does not create an additional hazard or a traffic problem necessitating special policing of the caravans and that the caravaning of cars does not create undue wear and tear on the highways of the state; that the fees charged are excessive and bear no relation to the added expense to the motor vehicle department of policing the highways of the State of California; and that they are disproportionate to other taxes or license fees charged by the state for the use of the highways. The court concluded that the statute discriminated against interstate commerce, deprived appellees of their property without due process and denied to them equal protection of the laws in that it applies only to those using the highways

for the transportation of motor vehicles for the purposes of sale and does not apply to other persons using the highways under comparable circumstances.

Appellants assail here the findings of fact of the court below on which it predicated its conclusion of unconstitutionality, and insist that upon the evidence there is no basis for the conclusion that the fees exacted are excessive or that there is discrimination against interstate commerce or a denial of equal protection or due process.

JURISDICTION OF THE DISTRICT COURT.

A motion of appellants in the court below to dismiss the bill of complaint for want of the jurisdictional amount was withdrawn, and the jurisdiction of the district court is not challenged here. But on the argument, it appearing doubtful whether the "matter in controversy" exceeded "the sum or value of" $3,000, § 24(1) of the Judicial Code; 28 U. S. C. § 41 (1), we raised the question whether the jurisdictional amount was involved, as was our duty. *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10, 13; *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283, 287, note 10. The bill of complaint alleges generally that "the amount involved in this litigation is in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs." But it is plain that this allegation is insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit. As the bill of complaint shows on its face, and as the findings establish, each appellee maintains his own separate and independent business, which is said to be affected by the challenged fees. No joint or common interest of appellees in the subject matter of the suit is shown. Cf. *Gibbs* v. *Buck,* 307 U. S. 66.

It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements. *Wheless* v. *St. Louis,* 180 U. S. 379; *Rogers* v. *Hennepin County,* 239 U. S. 621; *Pinel* v. *Pinel,* 240 U. S. 594; *Scott* v. *Frazier,* 253 U. S. 243. The general allegation in the bill of complaint that "the amount involved in this litigation is in excess of" $3,000 and the finding of the court that "the amount involved in the within action" exceeds the jurisdictional amount, give no indication that the amount in controversy with respect to the claim of any single plaintiff exceeds the jurisdictional amount and are insufficient to show that the district court had jurisdiction of the cause. *Pinel* v. *Pinel, supra.*

Examination of the record shows that only in the case of a single appellee, Paul Gray, Inc., is there any allegation or proof tending to show the amount in controversy. As to it the bill of complaint alleges that "it causes to be caravaned into the said state . . . approximately one hundred fifty (150) automobiles each year." This allegation is supported by evidence that this appellee is regularly engaged in the business and tending to show that its volume exceeded that amount when the act went into effect July 2, 1937. Since the amount in controversy in a suit to restrain illegal imposition of fees or taxes is the amount of the fees or taxes which would normally be collected during the period of the litigation, *Healy* v. *Ratta,* 292 U. S. 263, we cannot say, upon this state of the record, that jurisdiction was not established as to appellee Paul Gray, Inc.

We ignore affidavits filed here for the purpose of supplementing the record by showing the amount in controversy as to another appellee. While it has been the prac-

tice of this Court to receive affidavits for the purpose of establishing its own appellate jurisdiction under statutes prescribing that a specified amount in controversy is prerequisite to the appeal, *Williamson* v. *Kincaid,* 4 Dall. 20; *Rush* v. *Parker,* 5 Cranch 287; *Roura* v. *Philippine Islands,* 218 U. S. 386; see *Red River Cattle Co.* v. *Needham,* 137 U. S. 632, that procedure is inapplicable here. Our review of the action of the district court in assuming jurisdiction is confined to the record before the district court. *Henneford* v. *Northern Pacific Ry. Co.,* 303 U. S. 17.

Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved.[2] Otherwise an appellate court could be called on to sustain a decree in favor of a plaintiff who had not shown that his claim involved the jurisdictional amount, even though the suit were dismissed on the merits as to the other plaintiffs who had established the jurisdictional amount for themselves. Although it appears that such a result could not follow here, we think it better practice to dismiss the suit for want of the jurisdictional amount as to all appellees except Paul Gray, Inc. See *Rich* v. *Lambert,* 12 How. 347; *Ex parte Baltimore & Ohio Railroad Co.,* 106 U. S. 5; *Hassall* v. *Wilcox,* 115 U. S. 598. Cf. *Grosjean* v. *American Press Co.,* 297 U. S. 233.

[2] A different question is involved in the case of a creditor's bill to liquidate an insolvent corporation for the benefit of all creditors. There his claim must exceed the jurisdictional amount. *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77. But creditors whose claims are less may be made parties because of their interest in a fund brought within the jurisdiction of the court. *Gibson* v. *Shufeldt,* 122 U. S. 27; *Handley* v. *Stutz,* 137 U. S. 366; *National Bank of Commerce* v. *Allen,* 90 F. 545, 555–556.

DISCRIMINATION.

Apart from appellees' insistence that the fees are an unconstitutional burden on interstate commerce because excessive, the substance of their contention is that the statute discriminates between automobiles transported into the state singly and those similarly transported intrazone, for which no fee is charged, and also that the statute discriminates between those cars driven by appellees in caravans and those similarly driven wholly within either of the state zones, for which no fee is charged.

In *Morf* v. *Bingaman,* 298 U. S. 407, we had occasion to consider the validity of a fee or tax exacted by New Mexico for the transportation into the state of any motor vehicle for the purpose of sale within or without the state. It there appeared that the plaintiff, with others, was engaged in transporting motor cars on their own wheels in caravans across the State of New Mexico for the purpose of sale, and that their transportation for that purpose had resulted in the creation of a distinct class of motor vehicle traffic of considerable magnitude. In the course of this business second-hand cars purchased at points in the east are assembled in caravans, which are driven as such to the point of sale in California. Large numbers of the cars are coupled in twos, each two in charge of a single driver who operates the forward car and controls the movement of both by the use of the mechanism and brakes of one. The drivers of caravans, except two or three regularly engaged, are casually employed and serve without pay or for small compensation in order to secure transportation to the point of destination. We said, page 411–412:

"The legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than

drivers of state licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. . . . There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the state a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways."

The State of California has found it expedient to adopt licensing provisions for this class of traffic and to exact the fees specified in the statute for the use of its highways and the expense of policing. That this peculiar type of traffic occurs in large volume between eastern points and points in California, and that there is basis for the legislative judgment that the traffic imposes special burdens on the use of the state highways for which a special charge may be made, are abundantly supported by the record. The parties have stipulated that fifteen thousand automobiles are brought into the state for sale annually. Of these, from 80 to 90 per cent. come in caravans or convoys, and of the cars so moving one-half are coupled together in twos. It further appears by stipulation that the caravans or convoys are made up of from nineteen to twenty-five cars.

There is much evidence in the record indicating that it is the long haul traffic in cars for sale in California which tends to produce the movement in large caravans or convoys in order to save expense of transportation, and which in turn tends to impose special burdens on the state in connection with the use of its highways, calling for the imposition of regulations and fees different from those applied to other types of motor car movement. Without repeating what was said more at length of like traffic in *Morf* v. *Bingaman, supra,* the evidence in the present case shows that coupled cars, under control of a single driver, subject the highways to increased wear and tear because of their tendency to skid and sway on curves and in passing other traffic, and that the length of the caravans and the inefficiency and irresponsibility of the drivers, casually employed, increase traffic congestion and the inconveniences and hazards of automobile traffic. These circumstances have caused the state to make increased provision for the policing of the traffic. It is true that the district court found that the practice of caravaning creates no additional traffic hazard, nor any undue wear and tear on the highways. But in this we think that its determination was not only contrary to the evidence, but went beyond the judicial province.

It is no longer open to question that the states have constitutional authority to exact reasonable fees for the use of their highways by vehicles moving interstate, *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Clark* v. *Poor,* 274 U. S. 554; *Sprout* v. *South Bend,* 277 U. S. 163; *Morf* v. *Bingaman, supra; Dixie Ohio Express Co.* v. *State Revenue Comm'n, ante,* p. 72, and that for that purpose they may classify the vehicles according to the character of the traffic and the burden it imposes on the state by that use, and charge for the use a fee not shown to be unreasonable or ex-

cessive. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370–371; *Hicklin* v. *Coney,* 290 U. S. 169; *Morf* v. *Bingaman, supra,* 413; *Dixie Ohio Express Co.* v. *State Revenue Comm'n, supra.*

The classification of the traffic for the purposes of regulation and fixing fees is a legislative, not a judicial, function. Its merits are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard. Cf. *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 299. The determination of the legislature is presumed to be supported by facts known to it, unless facts judicially known or proved preclude that possibility. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 584; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251, 263; s. c. 11 F. Supp. 599, 600; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 191–192; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 153–154. Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles using the state highways in interstate commerce. *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* 187 *et seq.* The legislature must be assumed to have acted on information available to courts, and where, as here, the evidence, like that discussed in *Morf* v. *Bingaman, supra,* shows that it is at least a debatable question whether the traffic in caravans involves special wear and tear of the highways and increased traffic hazards requiring special police control, decision is for the legislature and not the courts. *Standard Oil Co.* v. *Marysville,*

supra; South Carolina Highway Dept. v. *Barnwell Bros., supra.*

Appellee Paul Gray, Inc., so far as appears, caravans its cars for sale in California from Detroit, Michigan, and St. Joseph, Missouri. Its cars, like those of the other appellees, move in caravans of from nineteen to twenty-five cars. It does not appear, nor is it contended, that this appellee transports any cars singly. From what has been said it is evident, as was decided in *Morf* v. *Bingaman, supra,* that cars moving in caravans of the type described constitute a special class of traffic which may be taxed or charged for differently from other classes without infringing the equal protection clause.

The argument that the statute denies equal protection to appellees because it exacts fees for cars transported into the state for sale singly but none for cars which move similarly intrazone or for those which enter the state not for the purposes of sale, ignores the actual circumstances in which the statute is applied to appellees, as shown by the record, and seeks to take advantage of an alleged discrimination which, if it exists, does appellees no harm. The Fourteenth Amendment does not require classification for fees, more than for taxation, to follow any particular form of words. If that adopted results in the application of the exaction to a class which may be separately charged without a denial of equal protection, those within the class cannot complain that it might have been more aptly defined or that the statute may tax others who are not within the class. See *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Silver* v. *Silver,* 280 U. S. 117, 123; *Morf* v. *Bingaman, supra,* 413.

It is the practice of transporting automobiles for long distances over the highway for purpose of sale which has given rise to the practice of moving them in caravans. The use of automobiles for other purposes, or for pleasure, does not have that result. The classification of the stat-

ute, in its practical application, embraces and is constitutionally applicable to cars moving in caravans, the class of traffic in which appellee Paul Gray, Inc., engages and on which it is alone taxed. One form of discrimination of which it complains is that fees are exacted for cars driven into the state singly for sale but not for those driven singly to market intrazone or singly from without the state for other purposes. Appellee does not show that it belongs to either class, and so far as the traffic in which it participates is properly taxed, it cannot complain of the imposition of the charge on a business which it does not do.

So far as appellees complain that no fee is exacted for cars which move for sale intrazone in caravans, different considerations apply. As we have said, it is the long haul of cars for sale which has produced motor vehicle caravans and has made them a special class for the purposes of regulation and imposition of fees. It was for the legislature to consider and decide whether the actual conditions which prevail in the state, affecting movement of cars for sale, eliminate or so reduce the burden of the caravan traffic on the highways as to call for a different classification of the short haul traffic for the purposes of regulation and fees. The legislature having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can say that it is without any substantial basis. *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 73; *Continental Baking Co.* v. *Woodring, supra; Sproles* v. *Binford*, 286 U. S. 374; *Hicklin* v. *Coney, supra; Aero Mayflower Transit Co.* v. *Public Service Comm'n*, 295 U. S. 285.

The trial court found that cars are often moved in convoys in Zone 1, which includes the metropolitan area of Los Angeles, and it thought this sufficient to establish an unlawful discrimination without consideration of the

other conditions affecting the intrazone traffic. The evidence establishes, beyond any reasonable doubt, that the movement intrazone of cars for sale in convoys similar to that of appellees is negligible and that the principal sources of cars for sale moving intrazone are the assembly plants of automobile manufacturers located in or near the metropolitan areas of Los Angeles and San Francisco. Being new cars, the bulk of them, shipped interstate or to distant points intrastate, move by rail, water, or truck. Most of those which move on their own wheels are driven relatively short distances, seventy-five miles or less, in the metropolitan area over highways of more than two lanes, as distinguished from caravans coming from without the state, which move for long distances over two-lane highways in mountain districts. The proportion driven singly does not appear. Such convoys or caravans as there are usually consist of two or three cars. The evidence discloses no case of more than four. Coupling is negligible. Each car is in charge of a regularly employed and licensed driver. The intrazone movement is subject to other licensing and taxing provisions of the state law, and no showing is made that the differences in fees or taxes exacted from the two classes of traffic do not bear a fair relationship to the differences in the burden of the traffic for which the state must provide.

The legislature could reasonably have concluded that the wear and tear and injury to the highways from driving coupled cars intrazone was negligible, and that the relatively short distances which cars are driven in twos or threes, the character of the highways used, and the difference in the class of drivers, taken together, eliminate from the intrazone traffic or so substantially reduce the burden imposed by traffic like that of appellees moving interstate or interzone as to require, in fairness, a different classification for the purpose of fees charged for the use of the highways. We cannot say that that conclusion

is without support or infringes the principles which we have repeatedly recognized as defining the power of the states, in the absence of Congressional action, to classify vehicles or traffic for the purposes of regulating use of the highways by vehicles moving interstate. If the classification with respect to a matter remaining within state control, despite the commerce clause, is otherwise valid, it is not any the less so because it affects interstate commerce. See *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* 191–192, and cases cited. As the state has authority to charge a reasonable fee for the use of its highways, and as the classification of the traffic which the state has made for the purpose of fixing the fees is valid, the only remaining question is whether the fees which it has fixed must be deemed excessive.

REASONABLENESS OF THE FEES.

In *Ingels* v. *Morf, supra,* the $15 fee charged under the California Act of 1935 for driving a car into the state for purpose of sale was contested as excessive. There the statute declared that the fee was "intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this Act, and the added expense of policing the highways over which such caravaning may be conducted, . . ." and the automobile owner assumed and by proof sustained the burden of showing that the charge made for the precise purposes defined by the statute was excessive. We accepted the evidence as establishing that the cost of issuing caravan permits was about $5 per car and as supporting the finding of the trial court that the cost of policing did not exceed $5 a car. And we concluded that the total cost of administration and policing was substantially less than the $15 fee charged.

Here a fee of $7.50 is collected for administration and enforcement of the Act and a fee of like amount is charged

for the use of the highways. Appellees have offered no proof that either of the fees is too large, although the burden rested upon them to show that the fees were excessive for the declared purposes. *Hendrick* v. *Maryland, supra,* 624; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 251; *Morf.* v. *Bingaman, supra,* 410; *Ingels* v. *Morf, supra,* 296. *Great Northern Ry. Co.* v. *Washington,* 300 U. S. 154, is not to the contrary.

Appellants, without abandoning their position that the burden of proof rests on appellees, offered evidence to show that the costs of administration and policing proved in *Ingels* v. *Morf, supra,* were incomplete. Due to the nature of the case much of the proof is inexact and speculative. But there is evidence that thirty-nine officers devoted part or all of their time to enforcing the 1937 Act. The expense of operating their automobiles and motorcycles is considerable; an increased burden is imposed upon the personnel of the border police stations; and some increase in clerical force and in expenditures for stationery and miscellaneous items has been required. Investigations of attempted evasions increase the unit cost above that of other types of traffic. The total of these added expenses, as computed by appellants at about $133,000 annually, certainly approximates the amount of the revenue derived from the fees. The aggregate of the fees collected during eleven months for 14,000 cars at $7.50 each is $105,000. Appellees do nothing to challenge this evidence, and they point to no specific errors in the estimates or computation upon which appellants calculate the costs.

The state is not required to compute with mathematical precision the cost to it of the services necessitated by the caravan traffic. If the fees charged do not appear to be manifestly disproportionate to the services rendered, we cannot say from our own knowledge or experience that they are excessive. *Kane* v. *New Jersey, supra,* 168;

Interstate Busses Corp. v. *Blodgett, supra,* 251, 252; *Morf* v. *Bingaman, supra; Dixie Ohio Express Co.* v. *State Revenue Comm'n, supra;* see *Patapsco Guano Co.* v. *North Carolina,* 171 U. S. 345, 354; *McLean & Co.* v. *Denver & Rio Grande R. Co.,* 203 U. S. 38, 55; *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186. Appellees have failed to sustain the burden of proof that either of the fees is excessive for the purpose for which it is collected.

The trial court seems to have thought as appellees argue, that unreasonableness of the fees was established by proof that the same fees are not imposed on other classes of traffic. But since, as we have seen, there is basis for the classification of the traffic, there is basis for a difference in fees charged the different classes. *Hendrick* v. *Maryland, supra; Interstate Busses Corp.* v. *Blodgett, supra.* Appellees have laid no foundation for any contention that there are not compensating differences in the traffic comparable to the difference in fees, or for impeaching the legislative judgment that those specified are fairly related to the traffic to which they are applied.

The cause will be reversed with instructions to the district court to dismiss the case as to appellee Paul Gray, Inc., on the merits, and to dismiss as to the other appellees for want of jurisdiction.

Reversed.

Mr. Justice Black is of the opinion that the case should be dismissed for want of jurisdiction as to all the appellees.

NATIONAL LABOR RELATIONS BOARD *v.* FAINBLATT ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 514. Argued March 8, 9, 1939.—Decided April 17, 1939.

1. The National Labor Relations Act is applicable to manufacturers whose product is shipped in interstate commerce under circumstances such that cessation of work by their employees by reason of strikes or labor disputes would result in cessation of the movement of the manufactured product in interstate commerce. Consequently the Act is applicable to employers, not themselves engaged in interstate commerce, who are engaged in a relatively small business of processing materials which are regularly transmitted to them by the owners through the channels of interstate commerce and which, after the processing, are returned to the owner's agent at the factory, and by him shipped to interstate destinations. P. 604.
2. Whether the materials are owned by the processor and whether they are shipped directly to him or to representatives of the owners at the processor's factory, are immaterial. The shipments to and from the factory are none the less interstate commerce because the transportation did not begin or end with the transfer of title of the merchandise transported. P. 605.
3. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce, be it great or small. The amount of commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication. P. 606.
4. In the National Labor Relations Act Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved. P. 606.

98 F. 2d 615, reversed.

CERTIORARI, 305 U. S. 594, to review a judgment denying a petition of the National Labor Relations Board for enforcement of one of its orders.

Mr. Charles Fahy, with whom *Solicitor General Jackson,* and *Messrs. Charles A. Horsky, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* were on the brief, for petitioner.

Mr. T. Girard Wharton, with whom *Messrs. Leon Gerofsky* and *Joseph Halpern* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This petition raises the question whether the National Labor Relations Act is applicable to employers, not themselves engaged in interstate commerce, who are engaged in a relatively small business of processing materials which are transmitted to them by the owners through the channels of interstate commerce and which after processing are distributed through those channels.

Pursuant to § 10 (b) of the National Labor Relations Act, c. 372, 49 Stat. 449; 29 U. S. C. § 151 *et seq.,* the National Labor Relations Board issued its complaint charging respondents with unfair labor practices in violation of § 8 (1), (3), (5) and § 2 (6), (7) of the Act. After a hearing, which resulted in a decision and order of the Board, a supplemental hearing was held pursuant to order of the Court of Appeals for the Third Circuit, which resulted in a supplemental decision and an order reaffirming the Board's original findings and conclusions of law and modifying the original order in one respect not now material.

The facts, as found by the Board, are that respondents, under the name of Somerset Manufacturing Company, are engaged at Somerville, New Jersey, in the business of processing materials into various types of women's sports garments. They operate what is known as a "contract shop." The materials are supplied by and are the property of the Lee Sportswear Company, a partnership

located in New York City. The cloth from which the garments are made is usually cut by the Lee Sportswear Company in New York City and then shipped by truck to respondents' factory in New Jersey. Sometimes the raw materials are shipped, on the order of the Lee Sportswear Company, directly from the mills manufacturing them, many of which are outside of New Jersey. All the materials are manufactured at respondents' New Jersey factory under contract. The finished garments are there delivered to a representative of the Lee Sportswear Company, who ships them to the company in New York City or directly to its customers throughout the United States.

Throughout the year there is normally a continuous day-by-day flow of shipments of raw materials to respondents' factory from points without the state, and of finished garments from respondents' plant to New York City and other points outside of New Jersey. During the years 1934 and 1935 respondents appear to have finished more than a thousand dozen garments each month. In the course of the supplemental hearing in 1937 it appeared that respondents had increased their working force from sixty to approximately two hundred employees, from which the Board inferred a corresponding increase of output. Immediately preceding a strike of thirty-four of the workers in respondents' tailoring department, which occurred in September, 1935, and which the Board found to be induced by the unfair labor practices of respondents, shipments were about 80 per cent. of those for the corresponding period in 1934. Following the strike, output decreased by more than one-half, or to 38 per cent. of the shipments for the corresponding period in 1934.

The Board concluded that respondents' unfair labor practices had led and tended "to lead to labor disputes burdening and obstructing commerce and the free flow of commerce." Its order as modified directed respondents to desist from interfering with their employees' right to

join a local union and from discouraging membership in the union by discharging them or discriminating against them in the terms of their employment, and it directed respondents to reinstate certain employees who had struck because of the unfair labor practices, some with back pay.

The Board's petition for enforcement of its order was denied by the Court of Appeals for the Third Circuit, 98 F. 2d 615, on the ground that respondents were not themselves engaged in interstate commerce and had no title or interest in the raw materials or finished products which moved to and from respondents' factory in New Jersey from and to points outside the state. We granted certiorari January 9, 1939, the question being one of public importance in the administration of the National Labor Relations Act.

Only the question of the Board's jurisdiction is raised by the petition and in briefs and argument. It has been settled by repeated decisions of this Court that an employer may be subject to the National Labor Relations Act although not himself engaged in commerce. The end sought in the enactment of the statute was the prevention of the disturbance to interstate commerce consequent upon strikes and labor disputes induced or likely to be induced because of unfair labor practices named in the Act. That those consequences may ensue from strikes of the employees of manufacturers who are not engaged in interstate commerce where the cessation of manufacture necessarily results in the cessation of the movement of the manufactured product in interstate commerce, has been repeatedly pointed out by this Court. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38–40; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Santa Cruz Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 463 *et seq.*; cf. *Consolidated*

Edison Co. v. *National Labor Relations Board,* 305 U. S. 197.. Long before the enactment of the National Labor Relations Act it had been many times held by this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.[1]

Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers. Whether shipments were made directly to respondents, as the Board found, or to a representative of Lee Sportswear Company at the factory, as respondents contend, is immaterial. It was not any the less interstate commerce because the transportation did not begin or end with the transfer of title of the merchandise transported. See *Santa Cruz Packing Co.* v. *National Labor Relations Board, supra,* 463; cf. *Gloucester Ferry Co.* v. *Pennsyl-*

[1] It may prohibit wholly intrastate activities which, if permitted, would result in restraint of interstate commerce. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310; *Bedford Cut Stone Co.* v. *Stone Cutters Assn.,* 274 U. S. 37, 46; *Local 167* v. *United States,* 291 U. S. 293, 297. It may regulate the activities of a local grain exchange shown to have an injurious effect on interstate commerce. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. It may regulate intrastate rates of interstate carriers where the effect of the rates is to burden interstate commerce. *Houston, E. & W. Texas Ry. Co.* v. *United States,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *United States* v. *Louisiana,* 290 U. S. 70, 74; *Florida* v. *United States,* 295 U. S. 301. It may compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad. *Southern Ry. Co.* v. *United States,* 222 U. S. 20. It may prescribe maximum hours for employees engaged in intrastate activity connected with the movement of any train, such as train dispatchers and telegraphers. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612, 619.

vania, 114 U. S. 196, 203; *Wabash, St. L. & P. Ry. Co.* v. *Illinois,* 118 U. S. 557; *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617, 619; *Morf* v. *Bingaman,* 298 U. S. 407; *Ingels* v. *Morf,* 300 U. S. 290. Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Champion* v. *Ames,* 188 U. S. 321.

Nor do we think it important, as respondents seem to argue, that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. *Hanley* v. *Kansas City Southern Ry. Co., supra.* The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act, has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.

The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved. Section 2 (6) defines commerce as "trade, traffic, commerce, transportation, or communication among the several States," without reference to its volume, and declares in subsection (7) that "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or

having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Section 10 (a) confers on the Board authority "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis*.

There are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce.[2] Some, like the clothing industry, are extensively unionized and have had a long and tragic history of industrial strife. It is not to be supposed that Congress, in its attempted nationwide regulation of interstate commerce through the removal of the causes of industrial

[2] In the year 1933 the women's clothing industry ranked ninth among manufacturing industries in number of workers employed and eighth in value of product. U. S. Biennial Census of Manufactures (Commerce Dept., 1933). In this industry the "contract shop" is common. About one-half of the 3,414 enterprises engaged in 1935 in the manufacture of women's dresses were "contract shops." U. S. Biennial Census of Manufactures (Commerce Dept., 1935). These enterprises employed an average of only about thirty-two employees each.

strife affecting it, intended to exclude such industries from the sweep of the Act. In this, as in every other case, the test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of a relationship of the employer and his employees to the commerce such that, to paraphrase § 10 (a) in the light of constitutional limitations, unfair labor practices have led or tended to lead "to a labor dispute burdening or obstructing commerce."

It is no longer open to question that the manufacturer who regularly ships his product in interstate commerce is subject to the authority conferred on the Board with respect to unfair labor practices whenever such practices on his part have led or tend to lead to labor disputes which threaten to obstruct his shipments. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra; National Labor Relations Board* v. *Fruehauf Trailer Co., supra; National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., supra; Santa Cruz Packing Co.* v. *National Labor Relations Board, supra; Consolidated Edison Co.* v. *National Labor Relations Board, supra.* We cannot say, other things being equal, that the tendency differs in kind, quantity or effect merely because the merchandise which the manufacturer ships, instead of being his own, is that of the consignee or his customers in other states. In either case commerce is in danger of being obstructed in the same way and to the same extent.

Here, although respondents' manufacturing business is small, employing from sixty to two hundred employees, its product is regularly shipped in interstate commerce. The Board's finding that respondents' unfair labor practices have led and tend to lead to labor disputes burdening interstate commerce and interfering with its free flow is supported by the evidence. Moreover, the Board has found specifically that respondents' unfair labor practices in attempting to prevent the unionization of their factory

did in fact lead to a strike in respondents' tailoring establishment, with a consequent reduction of about 50 per cent. in respondents' output. These findings are not challenged.

The threatened consequences to interstate commerce are as immediate and as certain to flow from respondents' unfair labor practices as were those which were held to result from unfair labor practices in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra; National Labor Relations Board* v. *Fruehauf Trailer Co., supra; National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., supra; Santa Cruz Packing Co.* v. *National Labor Relations Board, supra; Consolidated Edison Co.* v. *National Labor Relations Board, supra.* That the volume of commerce affected is smaller than in other cases in which the jurisdiction of the Board has been upheld, for reasons already stated, is in itself without significance.

Reversed.

MR. JUSTICE McREYNOLDS, dissenting:

MR. JUSTICE BUTLER and I conclude that the challenged judgment should be affirmed.

Respondent, Benjamin Fainblatt, as sole owner, conducts a small plant for manufacturing wearing apparel located at Somerville, New Jersey, where he employs some sixty women. There he receives material belonging to Lee Sportswear Company of New York and under contract converts this into garments. These are delivered to the company's representative and payment is made for the work done. The owner sends the finished products to New York.

The Labor Board claims jurisdiction in respect of employment at this establishment upon the theory that the material and garments move in interstate commerce;

that disapproved labor practices there may lead to disputes; that these may cause a strike; that this may reduce the factory output; that because of such reduction less goods may move across the state lines; and thus there may come about interference with the free flow of commerce between the states which Congress has power to regulate. So, it is said, to prevent this possible result Congress may control the relationship between the employer and those employed. Also, that the size of the establishment's normal output is of minor or no importance. If the plant presently employed only one woman who stitched one skirt during each week which the owner regularly accepted and sent to another state, Congressional power would extend to the enterprise, according to the logic of the Court's opinion.

Manifestly if such attenuated reasoning—possibility massed upon possibility—suffices, Congress may regulate wages, hours, output, prices, etc., whenever any product of employed labor is intended to pass beyond state lines—possibly if consumed next door. Producers of potatoes in Maine, peanuts in Virginia, cotton in Georgia, minerals in Colorado, wheat in Dakota, oranges in California, and thousands of small local enterprises become subject to national direction through a Board.

Of course, no such result was intended by those who framed the Constitution. If the possibility of this had been declared the Constitution could not have been adopted. So construed, the power to regulate interstate commerce brings within the ambit of federal control most if not all activities of the Nation; subjects states to the will of Congress; and permits disruption of our federated system.

Kidd v. *Pearson* (1888) 128 U. S. 1, 20, 21, lucidly pointed out the necessary result of this subversive doctrine, showed how it had long been authoritatively rejected, and demonstrated its utter absurdity. A few

paragraphs from that opinion may quicken estimation of what now impends.

"We think the construction contended for by plaintiff in error would extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is inconsistent with its objects and scope. The language of the grant is, 'Congress shall have power to regulate commerce with foreign nations and among the several States,' etc. These words are used without any veiled or obscure signification. 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said.' *Gibbons* v. *Ogden, supra,* at page 188 [9 Wheat. 1, 188].

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile* v. *Kimball,* 102 U. S. 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny

that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be, local in all the details of their successful management."

The doctrine approved in *Kidd* v. *Pearson* has been often applied. It was the recognized view of this Court for more than a hundred years.

United States v. *E. C. Knight Co.,* (1895) 156 U. S. 1, 16 declared—

"Slight reflection will show that if the national power extends to all . . . productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

Oliver Iron Co. v. *Lord,* (1923) 262 U. S. 172, 178—

"Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. . . . Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

Schechter Corp. v. *United States,* (1935) 295 U. S. 495, 546, 548, 549, 550—

"If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. . . . The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. . . . If the federal government may determine the wages and hours of employees in the internal commerce of a State . . . it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. . . . But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. . . . The recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution."

Carter v. *Carter Coal Co.*, (1936) 298 U. S. 238, 303, 309—

"Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. . . . The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the

Schechter case. . . . There is no basis in law or reason for applying different rules to the two situations."

The present decision and the reasoning offered to support it will inevitably intensify bewilderment. The resulting curtailment of the independence reserved to the states and the tremendous enlargement of federal power denote the serious impairment of the very foundation of our federated system. Perhaps the change of direction, no longer capable of concealment, will give potency to the efforts of those who apparently hope to end a system of government found inhospitable to their ultimate designs.

DECISIONS PER CURIAM, ETC., FROM JANUARY 17, 1939, THROUGH APRIL 17, 1939.*

No. 552. ARROW DISTILLERIES, INC. *v.* ALEXANDER, ADMINISTRATOR OF THE FEDERAL ALCOHOL ADMINISTRATION. Appeal from the District Court of the United States for the District of Columbia. January 30, 1939. *Per Curiam:* Motion of the appellee to affirm granted and order denying an interlocutory injunction affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338; *Eureka Productions, Inc.* v. *Lehman,* 302 U. S. 634. *Mr. Horace J. Donnelly, Jr.* for appellant. *Solicitor General Jackson* for appellee. Reported below: 24 F. Supp. 880.

No. —, original. EX PARTE CLARENCE M. BRUMMETT. January 30, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. EX PARTE SOLOMON G. SALOMON. January 30, 1939. Motion for leave to file petition for writ of mandamus denied. The CHIEF JUSTICE took no part in the consideration and decision of this application.

No.—, original. EX PARTE FORREST HOLIDAY. January 30, 1939. Motion for leave to file petition for writ of habeas corpus denied.

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* For decisions on applications for certiorari, see *post,* pp. 622, 630; on petitions for rehearing, p. 666.

No. —. Ex parte Joseph Poresky. January 30, 1939. Motion for interlocutory decree and amendment denied.

No. 192. Caswell *v.* Morgenthau, Secretary of the Treasury, et al. January 30, 1939. Motion for leave to file a petition for rehearing denied. 305 U. S. 596.

No. 539. Societe Suisse Pour Valeurs de Metaux *v.* Cummings, Attorney General, et al. January 30, 1939. Motion to substitute granted and Frank Murphy, present Attorney General of the United States, is substituted as a party respondent in the place and stead of Homer S. Cummings, resigned. Mr. Justice Stone took no part in the consideration and decision of this motion.

No. 489. Eastern Shore Public Service Co. et al. *v.* Seaford. Appeal from the Supreme Court of Delaware. February 6, 1939. *Per Curiam:* The appeal is dismissed for the want of a properly presented substantial federal question. *New Orleans Waterworks Co.* v. *Louisiana,* 185 U. S. 336, 344, 345; *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18, 30; *Seattle & Renton Ry. Co.* v. *Linhoff,* 231 U. S. 568, 570; *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277. Petition for writ of certiorari denied. *Mr. Daniel O. Hastings* for appellants. *Mr. James R. Morford* for appellee. Reported below: 2 A. 2d 265.

No. —, original. Ex parte Mike Holchak. Argued January 30, 1939. Decided February 6, 1939. Motion for leave to file petition for writ of habeas corpus denied and rule to show cause discharged.

Mr. Frank J. Wideman, with whom *Mr. Raymond Sparks* was on the brief, for petitioner. *Mr. Earl Warren,* Attorney General of California, with whom *Mr. William F. Cleary* was on the brief, submitted for Smith, Warden, respondent.

No. —, original. Ex parte J. L. Stewart. February 13, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. 643. Simmons *v.* Board of Education et al. Appeal from the District Court of the United States for the Eastern District of Oklahoma. February 27, 1939. *Per Curiam:* Motion to dismiss on the ground that the cause has become moot denied. Motion to affirm granted upon the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Rule 7, par. 4. The judgment is affirmed. *Mr. Charles A. Chandler* for appellant. *Messrs. Mac Q. Williamson* and *Ezra Brainerd, Jr.* for appellees.

No. —, original. Ex parte Albert Leighton. February 27, 1939. Motion for leave to file petition for writ of mandamus denied.

No. —, original. Ex parte Joseph J. O'Brien. February 27, 1939. Motions for leave to file petitions for writs of habeas corpus and mandamus denied.

No. —, original. Ex parte Patriotic Society of Unemployed Persons of the United States. March 6, 1939. Motion for leave to file petition for writ of mandamus denied.

No. 127. MACKAY RADIO & TELEGRAPH CO. *v.* RADIO CORPORATION OF AMERICA. March 6, 1939. Ordered that the opinion in this case be modified by substituting for the last five lines of the third paragraph on page 8, the following: "to wire lengths not multiples of half wave lengths, must fail, because such structures are not within the invention described in the application."

And by striking from the third line on page 11 of the opinion the words "the angle of."

And by striking from the opinion the full sentence beginning in the fourth line on page 11.

The petition for rehearing is denied.

Reported as amended, *ante,* p. 86.

No. 515. LIFSON, ADMINISTRATOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. March 6, 1939. Motion for leave to file petition for rehearing denied. 305 U. S. 662.

No. —. PORESKY *v.* ELY, GOVERNOR, ET AL. March 13, 1939. Application denied.

No. 312. TAYLOR ET AL., INDEPENDENT COMMITTEE, *v.* STANDARD GAS & ELECTRIC CO. ET AL. March 13, 1939. The opinion of the Court announced February 27, 1939, is amended in the following particulars:

In the next to the last line, and the last line, of the first full paragraph on page 4 the words "to be assumed by the new company and," and the word "debentures" are stricken out and, at the end of the sentence, the words "debtor's notes" are to be inserted so that the sentence will read: "Standard's claim to the extent of $3,500,000 was to stand on a parity with the debtor's notes."

Reported as amended, *ante,* p. 307.

No. 567. PARAMOUNT PICTURES, INC., ET AL. *v.* LANGER, GOVERNOR, ET AL.; and

No. 568. SAME *v.* STRUTZ, ATTORNEY GENERAL, ET AL. Appeals from the District Court of the United States for the District of North Dakota. March 27, 1939. *Per Curiam:* The motion to reverse is granted. The judgment of the specially constituted District Court is reversed, without costs to either party in this Court, and the cause is remanded to the specially constituted District Court with directions to dismiss the proceeding on the ground that the cause has become moot, without prejudice to an application by either party to the specially constituted District Court for an award of costs in that court. *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 477–478; *Heitmuller* v. *Stokes,* 256 U. S. 359, 362–363; *Brownlow* v. *Schwartz,* 261 U. S. 216, 218. *Mr. Thomas D. Thacher* for appellants. *Mr. Abram F. Myers* for appellees. Reported below: 23 F. Supp. 890.

No. 586. GRIFFIN *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT, ET AL. Appeal from the Supreme Court of New York. March 27, 1939. *Per Curiam:* Since it appears that at the time the appeal was allowed the judgment of the court below was not final, *Chicago G. W. R. Co.* v. *Basham,* 249 U. S. 164, 166–167; *Citizens Bank* v. *Opperman,* 249 U. S. 448, 450; *Ohio Public Service Co.* v. *Fritz,* 274 U. S. 12, 13, the motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. *Mr. Reynolds Robertson* for appellant. *William H. Griffin, pro se. Mr. Einar Chrystie* for appellees. Reported below: 253 App. Div. 288; 2 N. Y. S. 2d 36; 15 N. E. 2d 439.

No. —. HARRIS *v.* NATIONAL MEDIATION BOARD. March 27, 1939. Application denied.

No. 294. TEXARKANA *v.* ARKANSAS LOUISIANA GAS CO. March 27, 1939. The motion of petitioner to amend the decree herein of February 6, 1939, is granted.

Said decree is amended by adding at the end thereof the following paragraph, to wit:

"It is further ordered that the decree of the United States District Court for the Eastern District of Texas, filed herein on July 31, 1937, be reversed in so far as it held that Section IX of the franchise was not applicable to the period prior to December 1, 1933."

No. 391. UNITED STATES *v.* JACOBS, EXECUTRIX. March 27, 1939. The motion to set aside the judgment is denied. *Ante,* p. 363.

No. 534. INGELS, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES, ET AL. *v.* PAUL GRAY, INC., ET AL. March 27, 1939. Frank W. Clark, present Director of the Department of Motor Vehicles of California substituted as a party appellant in the place and stead of Ray Ingels, resigned, on motion of *Mr. Everett W. Mattoon* for the appellees.

No. 688. BEARD *v.* SANFORD, WARDEN. March 28, 1939. Order denying petition for certiorari (*post,* p. 655.) withheld, conditioned on the filing of a petition for rehearing within ten days, on motion of *Mr. James F. Laughlin* for the petitioner.

No. —, original. EX PARTE PETER J. C. DONNELLY. April 3, 1939. Application denied.

No. 528. UTAH FUEL CO. ET AL. *v.* NATIONAL BITUMINOUS COAL COMM'N ET AL. April 3, 1939. It is

ordered that the decree entered in this case on January 30, 1939, be amended by striking out the third paragraph and substituting the following:

"On consideration whereof, It is ordered, adjudged, and decreed by this Court that the decree of the said Court of Appeals affirming the decree of the District Court of the United States for the District of Columbia dismissing the bill be, and the same is hereby, affirmed upon the grounds stated in the opinion of this Court."

It is further ordered that the mandate in this case be recalled and amended in accordance with this order.

No. 694. GABRIELLI *v.* KNICKERBOCKER ET AL. Appeal from the Supreme Court of California. April 17, 1939. *Per Curiam:* Motion of the appellees to dismiss the appeal herein granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. Olin R. Moyle* and *R. W. Henderson* for appellant. *Mr. Horace B. Wulff* for appellees. Reported below: 12 Cal. 2d 85; 82 P. 2d 391.

No. 813. JOHNSON ET AL. *v.* DEERFIELD ET AL. Appeal from the District Court of the United States for the District of Massachusetts. April 17, 1939. *Per Curiam:* The judgment is affirmed. *Leoles* v. *Landers,* 302 U. S. 656; *Hering* v. *State Board of Education,* 303 U. S. 624; *Hamilton* v. *The Regents,* 293 U. S. 245, 261–262. *Messrs. Olin R. Moyle* and *William G. Fennell* for appellants. No appearance for appellees. Reported below: 25 F. Supp. 918.

No. 516. GOINS *v.* UNITED STATES. On writ of certiorari, *post,* p. 623, to the Circuit Court of Appeals for the Fourth Circuit. Argued March 9, 10, 1939. Decided April 17, 1939. *Per Curiam:* As it appears on hearing argument that the District Court's failure to give Instruction B could not have prejudiced the petitioner, the writ of certiorari is dismissed. *Mr. S. H. Sutherland* for petitioner. *Mr. William W. Barron,* with whom *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* were on the brief, for the United States. Reported below: 99 F. 2d 147.

No. 367. EICHHOLZ *v.* PUBLIC SERVICE COMM'N OF MISSOURI ET AL. April 17, 1939. The last sentence of the opinion is modified to read as follows:

"The decree of the District Court so far as it denies an injunction is affirmed."

The petition for rehearing is denied.

Reported as amended, *ante,* p. 268.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 17, 1939, THROUGH APRIL 17, 1939.

No. 498. BONET, TREASURER OF PUERTO RICO, *v.* YABUCOA SUGAR CO. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for petitioner. *Mr. Earle T. Fiddler* for respondent. Reported below: 98 F. 2d 398.

No. 541. CARRIER ET AL. *v.* BRYANT. January 30, 1939. Petition for writ of certiorari to the Supreme Court of North Carolina granted. *Mr. John W. Wood* for peti-

tioners. *Messrs. Frederick D. Hamrick* and *Frederick D. Hamrick, Jr.* for respondent. Reported below: 214 N. C. 174; 198 S. E. 651.

No. 543. SPRAGUE *v.* TICONIC NATIONAL BANK ET AL. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Harvey D. Eaton* for petitioner. *Messrs. F. Harold Dubord, George P. Barse, James Louis Robertson,* and *Trevor V. Roberts* for respondents. Reported below: 99 F. 2d 583.

No. 516. GOINS *v.* UNITED STATES. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted, limited to the question whether the Circuit Court of Appeals should have reversed the judgment of conviction because of the refusal of the trial court to grant Instruction B requested by the defendant. *Mr. S. H. Sutherland* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 99 F. 2d 147.

No. 76. MAYTAG COMPANY *v.* HURLEY MACHINE CO. ET AL.; and

No. 77. SAME *v.* EASY WASHING MACHINE CO. See *post,* p. 666.

No. 603. MONTGOMERY WARD & CO. *v.* TOLEDO PRESSED STEEL CO. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Carl V. Wisner* for petitioner. *Messrs. Wilber Owen* and *Samuel E. Darby, Jr.* for respondent. Reported below: 99 F. 2d 806.

No. 651. HAGUE, MAYOR, ET AL. *v.* COMMITTEE FOR INDUSTRIAL ORGANIZATION ET AL. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. Proceedings for execution and enforcement of the decree of injunction entered herein are stayed pending the hearing and determination of the cause. *Messrs. James A. Hamill, John A. Matthews, Charles Hershenstein,* and *Edward J. O'Mara* for petitioners. *Messrs. Morris L. Ernst, Spaulding Frazer, Lee Pressman* and *Benjamin Kaplan* for respondents. Reported below: 101 F. 2d 774; 25 F. Supp. 127.

No. 626. TREINIES *v.* SUNSHINE MINING CO. ET AL. February 13, 1939. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, granted. *Mr. Thos. D. Aitken* for petitioner. No appearance for respondents. Reported below: 99 F. 2d 651.

No. 582. ELECTRICAL FITTINGS CORP. ET AL. *v.* THOMAS & BETTS CO. ET AL. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Samuel E. Darby, Jr.* and *Floyd H. Crews* for petitioners. *Messrs. Geo. Whitefield Betts, Jr., William Bohleber,* and *Francis H. Fassett* for respondents. Reported below: 100 F. 2d 403.

No. 606. SANTA MONICA MOUNTAIN PARK CO. *v.* UNITED STATES. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. John B. Milliken, Claude I. Parker,* and *L. A. Luce* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs.*

Sewall Key, J. Louis Monarch, and *W. Croft Jennings* for the United States. Reported below: 99 F. 2d 450.

No. 613. SOUTHERN PACIFIC CO. *v.* UNITED STATES. March 6, 1939. Petition for writ of certiorari to the Court of Claims granted. *Mr. James R. Bell* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 87 Ct. Cls. 442.

No. 650. BALDWIN ET AL., TRUSTEES, *v.* SCOTT COUNTY MILLING CO. March 13, 1939. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. H. H. Larimore* and *Thomas J. Cole* for petitioners. *Messrs. R. F. Baynes, Ralph E. Bailey,* and *James A. Finch* for respondent. Reported below: 343 Mo. 915; 122 S. W. 2d 890.

No. 660. MCCRONE *v.* UNITED STATES. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. H. Lowndes Maury* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Paul A. Freund, Charles A. Horsky,* and *Earl C. Crouter* for the United States. Reported below: 100 F. 2d 322.

No. 627. UNITED STATES *v.* AUTOMOBILE FINANCING, INC. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Jackson* for the United States. *Mr. James F. Kemp* for respondent. Reported below: 99 F. 2d 498.

No. 628. WOODRING, SECRETARY OF WAR, ET AL. *v.* WARDELL, RECEIVER. March 13, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. MR. JUSTICE REED took no part in the consideration and decision of this application. *Solicitor General Jackson* for petitioners. *Messrs. Brice Clagett* and *Charles E. Wainwright* for respondent. Reported below: 69 App. D. C. 280; 100 F. 2d 690.

No. 629. INLAND WATERWAYS CORP. ET AL. *v.* HARDEE, RECEIVER. March 13, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. MR. JUSTICE REED took no part in the consideration and decision of this application. *Solicitor General Jackson* for petitioners. *Messrs. Swagar Sherley, Charles F. Wilson, George B. Springston,* and *James B. Springston* for respondent. Reported below: 69 App. D. C. 268; 100 F. 2d 678.

No. 661. GENERAL ELECTRIC SUPPLY CORP. *v.* MAYTAG COMPANY. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. William H. Davis* and *Dean S. Edmonds* for petitioner. *Messrs. Thomas G. Haight, Wallace R. Lane, Oscar W. Jeffery, Benton Baker,* and *Nelson E. Johnson* for respondent. Reported below: 100 F. 2d 218.

No. 676. RORICK *v.* DEVON SYNDICATE, LTD. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. H. W. Fraser* for petitioner. *Messrs. Geo. D. Welles* and *Fred E. Fuller* for respondent. Reported below: 100 F. 2d 844.

No. 685. PALMER ET AL. *v.* MASSACHUSETTS. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Edward R. Brumley* and *R. Ammi Cutter* for petitioners. *Messrs. Paul A. Dever* and *Edward O. Proctor* for respondent.

No. 708. ROYAL INDEMNITY CO. *v.* WOODBURY GRANITE CO. ET AL. March 27, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Messrs. William F. Kelly* and *P. J. J. Nicolaides* for petitioner. *Messrs. Joseph Fairbanks* and *Edward Stafford* for Woodbury Granite Co. et al.; and *Mr. Louis M. Denit* for American Blower Co., respondents. Reported below: 101 F. 2d 689.

No. 701. STANDARD BRANDS, INC. *v.* NATIONAL GRAIN YEAST CORP. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted, limited to the question of the validity of Hayduck Patents Nos. 1,449,103; 1,449,105; and 1,449,106. *Mr. Charles P. Bauer* for petitioner. *Mr. Stephen H. Philbin* for respondent. Reported below: 101 F. 2d 814.

No. 772. H. P. HOOD & SONS, INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 809. WHITING MILK CO. *v.* SAME. March 27, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Charles B. Rugg, Warren F. Farr, H. Brian Holland, Archibald Cox,* and *Edward F. Merrill* for petitioners in No. 772. *Mr. Lawrence C. Jones,* Attorney General of Vermont, filed a memorandum, by leave of Court, in support of petitioners in No. 772. *Messrs. John M. Ray-*

mond, Lawrence Foster, and *Augustin H. Parker, Jr.* for petitioner in No. 809. *Solicitor General Jackson* for respondents. Reported below: 97 F. 2d 677.

No. 707. SCHNEIDER *v.* STATE (TOWN OF IRVINGTON). April 3, 1939. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey granted. *Mr. Olin R. Moyle* for petitioner. *Mr. Joseph C. Braelow* for respondent. Reported below: 121 N. J. L. 542; 3 A. 2d 609.

No. 748. FORD MOTOR CO. *v.* CLARK, SECRETARY OF STATE OF TEXAS, ET AL. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Palmer Hutcheson* for petitioner. No appearance for respondents. Reported below: 100 F. 2d 515.

No. 163. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WILSHIRE OIL CO.;

No. 164. SAME *v.* BANDINI PETROLEUM CO.; and

No. 165. SAME *v.* WILSHIRE ANNEX OIL CO. April 3, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. MR. JUSTICE REED took no part in the consideration and decision of this application. *Solicitor General Jackson* for petitioner. *Mr. Joseph D. Brady* for respondents. Reported below: 95 F. 2d 971.

No. 702. PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE, *v.* HOME OWNERS' LOAN CORP. April 17, 1939. Petition for writ of certiorari to the Court of Appeals of Maryland granted. *Messrs. William L. Henderson* and *H. Vernon Eney* for petitioner. *Solicitor Gen-*

eral Jackson, Assistant Attorney General Morris, and *Messrs. Sewall Key, Berryman Green, Warner W. Gardner, Harold Lee,* and *E. K. Neumann* for respondent. Reported below: 175 Md. 512; 2 A. 2d 689.

No. 720. BOARD OF COUNTY COMMISSIONERS *v.* UNITED STATES. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Thomas M. Lillard* for petitioner. *Solicitor General Jackson* for the United States. Reported below: 100 F. 2d 929.

No. 750. OKLAHOMA PACKING CO. ET AL. *v.* OKLAHOMA GAS & ELECTRIC CO. ET AL. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. W. R. Brown* for petitioners. *Messrs. I. J. Underwood, Robert M. Rainey,* and *Streeter B. Flynn* for respondents. Reported below: 100 F. 2d 770.

No. 749. SNYDER *v.* MILWAUKEE. April 17, 1939. Petition for writ of certiorari to the Supreme Court of Wisconsin granted. *Messrs. A. W. Richter* and *Osmond K. Fraenkel* for petitioner. *Mr. Walter J. Mattison* for respondent. Reported below: 230 Wis. 131; 283 N. W. 301.

No. 865. BRANON *v.* UNITED STATES ET AL. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Edward F. Merrill* for petitioner. No appearance for respondents. Reported below: 97 F. 2d 677.

DECISIONS DENYING CERTIORARI, FROM JANUARY 17, 1939, THROUGH APRIL 17, 1939.

No. 581. JACKSON, ADMINISTRATRIX *v.* CAPITAL TRANSIT CO. January 30, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Reynolds Robertson* and *Dorsey K. Offutt* for petitioner. No appearance for respondent. Reported below: 69 App. D. C. 147; 99 F. 2d 380.

No. 584. NEW YORK EX REL. ROSS *v.* WILSON, WARDEN. January 30, 1939. Petition for writ of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Joseph Ross, pro se.* No appearance for respondent. Reported below: 275 N. Y. 169; 295 N. Y. S. 42; 9 N. E. 2d 822.

No. 587. SAYLOR *v.* SANFORD, WARDEN. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Julian K. Saylor, pro se.* No appearance for respondent. Reported below: 99 F. 2d 605.

No. 521. WHITE *v.* JOHNSTON, WARDEN. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Samuel White, pro se.* No appearance for respondent.

No. 595. LINDERHOLM *v.* KANSAS. January 30, 1939. Petition for writ of certiorari to the Supreme Court of Kansas, and motion for leave to proceed further *in forma*

pauperis, denied. *Justus B. Linderholm, pro se.* No appearance for respondent. Reported below: 146 Kan. 224; 69 P. 2d 689.

No. 561. UNITED STATES EX REL. DE VITA *v.* UHL, DISTRICT DIRECTOR OF IMMIGRATION. January 30, 1939. Motion to proceed on typewritten papers granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Emily Marx* for petitioner. No appearance for respondent. Reported below: 99 F. 2d 825.

No. 520. MINNIS ET AL. *v.* SOUTHERN PACIFIC CO. ET AL. January 30, 1939. Motion for a writ of certiorari to correct a diminution of the record denied. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James L. Minnis* for petitioners. *Messrs. Arthur B. Dunne, Warren Olney, Jr.,* and *A. Crawford Greene* for respondents. Reported below: 98 F. 2d 913.

No. 549. MORLEY *v.* UNITED STATES. January 30, 1939. Motion to proceed on the typewritten record granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William A. Bryans* for petitioner. No appearance for the United States. Reported below: 99 F. 2d 683.

No. 539. SOCIETE SUISSE POUR VALEURS DE METAUX *v.* MURPHY, ATTORNEY GENERAL, ET AL. January 30, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE STONE took no part in the consideration and decision of this application. *Messrs. Frederic D. McKenney, John Spalding Flannery,* and *G. Bowdoin Craighill* for peti-

tioner. *Solicitor General Jackson, Assistant Attorney General Whitaker, Paul A. Sweeney, Harry LeRoy Jones* and *Brice Toole* for respondents. Reported below: 69 App. D. C. 154; 99 F. 2d 387.

No. 518. Southern California Freight Lines *v.* Commissioner of Internal Revenue. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Stanley W. Guthrie* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Warren F. Wattles* for respondent. Reported below: 99 F. 2d 104.

No. 523. Eppenauer et al. *v.* Ohio Oil Co. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Dan Moody* for petitioners. *Messrs. Ireland Graves* and *Charles L. Black* for respondent. Reported below: 98 F. 2d 524.

No. 524. Compton et al. *v.* Ohio Oil Co. et al. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Keeling* for petitioners. *Messrs. Ireland Graves* and *Charles L. Black* for respondents. Reported below: 98 F. 2d 524.

No. 525. Thomason et al. *v.* United Gas Public Service Co. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. P. Bullis* for petitioners. No appearance for respondent. Reported below: 98 F. 2d 526.

Nos. 530 and 531. SMITH ET AL. *v.* OCKERHAUSEN ET AL. January 30, 1939. Petition for writs of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. David F. Smith* for petitioners. *Mr. John E. Laskey* for respondents. Reported below: 69 App. D. C. 285; 100 F. 2d 695.

No. 535. TENNESSEE WESLEYAN COLLEGE *v.* COFFEY, RECEIVER, ET AL.; and

No. 536. SAME *v.* KENT, RECEIVER. January 30, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. J. A. Fowler* and *J. J. Lynch* for petitioner. *Messrs. William L. Frierson* and *R. P. Frierson* for respondents. Reported below: 97 F. 2d 686.

No. 538. MARYLAND CASUALTY CO. *v.* SAMMONS ET AL. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles Julian Bloch* for petitioner. No appearance for respondents. Reported below: 99 F. 2d 323.

No. 532. DEPPE *v.* GENERAL MOTORS CORP. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William P. Deppe, pro se.* No appearance for respondent. Reported below: 98 F. 2d 813.

No. 537. PACIFIC HEALTH CORP. *v.* CALIFORNIA EX REL. STATE BOARD OF MEDICAL EXAMINERS. January 30, 1939. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. John H. Riordan* for petitioner. *Messrs. Earl Warren* and *Lionel B. Browne* for respondent. Reported below: 12 Cal. 2d 156; 82 P. 2d 429.

No. 558. SWINDELL BROTHERS, INC., ET AL. *v.* HARTFORD-EMPIRE CO. January 30, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Samuel E. Darby, Jr., Lawrence C. Kingsland,* and *William B. Jaspert* for petitioners. *Messrs. Thomas G. Haight, Sidney F. Parham, William J. Belknap,* and *Robson D. Brown* for respondent. Reported below: 99 F. 2d 61.

No. 489. EASTERN SHORE PUBLIC SERVICE CO. ET AL. *v.* SEAFORD. See *ante,* p. 616.

No. 608. WILSON *v.* UNITED STATES. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. William H. Lewis* for petitioner. No appearance for the United States. Reported below: 99 F. 2d 544.

No. 612. MELENDEZ *v.* CALIFORNIA ET AL. February 6, 1939. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *George Melendez, pro se.* No appearance for respondents. Reported below: 25 Cal. App. 2d 490; 77 P. 2d 870.

No. 545. WINKLE *v.* SCOTT. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. M. Feigenbaum* and *Gus O. Nations* for petitioner. *Mr. Samuel B. Jeffries* for respondent. Reported below: 99 F. 2d 299.

No. 550. KOVEN *v.* UNITED STATES;

No. 551. DONEGAN *v.* SAME; and

No. 553. DILLIARD *v.* SAME. February 6, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Nathan L. Miller, Edward J. Bennett,* and *Nathan Probst, Jr.* for petitioner in No. 550. *Edmund J. Donegan, pro se. Messrs. John J. Burns, Samuel Becker,* and *Herbert Wechsler* for petitioner in No. 553. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Bernard Tompkins,* and *William J. Connor* for the United States. Reported below: 101 F. 2d 829.

No. 555. SHILLINGLAW *v.* COMMISSIONER OF INTERNAL REVENUE. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. L. A. Luce* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Charles A. Horsky,* and *Louise Foster* for respondent. Reported below: 99 F. 2d 87.

No. 556. RYAN *v.* UNITED STATES. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Price Wickersham* and *Clyde Taylor* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 99 F. 2d 864.

No. 563. ERVIN, TEMPORARY RECEIVER, *v.* QUINTANILLA ET AL. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frederick H. Wood* and *Palmer Pillans* for petitioner. *Mr. Max M. Schaumburger* for respondents. Reported below: 99 F. 2d 935.

No. 566. FELDMAN *v.* PACIFIC MUTUAL LIFE INSURANCE CO. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William C. Keough* for petitioner. *Mr. Thomas V. Koykka* for respondent. Reported below: 99 F. 2d 83.

No. 571. COOK *v.* LEWIS ET AL. February 6, 1939. Petition for writ of certiorari to the Circuit Court, Kanawha County, West Virginia, denied. *Messrs. James E. White* and *Samuel A. T. Watkins* for petitioner. *Messrs. Robert S. Spilman* and *Harold A. Ritz* for respondents.

No. 572. BELAND ET AL. *v.* UNITED STATES. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. T. Miller* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 100 F. 2d 289.

No. 575. STEIN *v.* MCGRATH ET AL. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry W. Pollock* for petitioner. *Messrs. E. F. Colladay, Wilton H. Wallace,* and *Nathaniel L. Goldstein* for McGrath et al.; *John Ross Delafield* for the Hurd Committee; and *Geo. E. Cleary* for the Reconstruction Finance Corporation, respondents. *Solicitor General Jackson* filed a memorandum for the United States. Reported below: 98 F. 2d 559.

No. 576. TISHMAN *v.* UNITED STATES. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John A.*

Verhoeven for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. Fred E. Strine* and *W. Marvin Smith* for the United States. Reported below: 99 F. 2d 951.

No. 580. MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. *v.* BOWMAN. February 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Philip E. Horan, John S. Leahy,* and *Lambert E. Walther* for petitioner. *Mr. W. C. Fraser* for respondent. Reported below: 99 F. 2d 856.

No. 392. HENNEFORD ET AL. *v.* PACIFIC TELEPHONE & TELEGRAPH CO. February 6, 1939. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. R. G. Sharpe* for petitioners. *Messrs. Otto B. Rupp* and *Alfred J. Schweppe* for respondent. Reported below: 195 Wash. 553; 81 P. 2d 786.

No. 609. VERHEUL *v.* JOHNSTON, WARDEN. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Ernest Verheul, pro se.* No appearance for respondent. Reported below: 99 F. 2d 757.

No. 633. LOHNES, ADMINISTRATOR, *v.* WEBB, ADMINISTRATOR. February 13, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. H. L. McCormick* for petitioner. No appearance for respondent. Reported below: 96 F. 2d 582; 101 F. 2d 242.

No. 636. STREWL ET AL. *v.* UNITED STATES. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied for the reason that the Court, upon examination of the papers herein submitted, finds that the application for writ of certiorari was not made within the time provided by law, Rule XI, Rules of Practice and Procedure in Criminal Cases (292 U. S. 665). *Mr. Joseph G. M. Browne* for petitioners. No appearance for the United States. Reported below: 99 F. 2d 474.

No. 557. HARTMAN *v.* SLOAN, U. S. MARSHAL. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. David A. Reed, John E. Green, Jr.,* and *Charles Denby, Jr.* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Mr. John Henry Lewin* for respondent. Reported below: 99 F. 2d 942.

No. 578. CARLISLE *v.* HAMMOND, U. S. MARSHAL. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. David A. Reed, Charles Denby, Jr., John E. Green, Jr.,* and *H. L. Stone* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Mr. John Henry Lewin* for respondent. Reported below: 100 F. 2d 227.

No. 559. BROWN *v.* NEW YORK LIFE INSURANCE CO. February 13, 1939. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Butler B. Hare* and *Calhoun A. Mays* for petitioner. *Mr. Alva M. Lumpkin* for respondent. Reported below: 99 F. 2d 199.

No. 560. FOREST GLEN CREAMERY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Willis D. Nance* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 98 F. 2d 968.

No. 569. INTERNATIONAL-GREAT NORTHERN RAILROAD CO. ET AL. *v.* HAWTHORNE. February 13, 1939. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. Robert H. Kelley* and *Roy C. Sewell* for petitioners. *Mr. S. P. Jones* for respondent. Reported below: 131 Tex. 622; 116 S. W. 2d 1056.

No. 570. VERSER-CLAY CO. ET AL. *v.* SECURITIES & EXCHANGE COMM'N. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. John B. Dudley* for petitioners. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Paul A. Freund* and *Chester T. Lane* for respondent. Reported below: 98 F. 2d 859.

No. 574. ZERO CHURCH *v.* BRITTON ET AL. February 13, 1939. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. T. D. Jennings* and *Marion W. Seabrook* for petitioner. *Messrs. John*

M. Daniel and *J. Ivey Humphrey* for respondents. Reported below: 188 S. C. 274; 198 S. E. 848.

No. 577. FREND ET AL. *v.* UNITED STATES. February 13, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Frederick A. Ballard* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *Edward J. Ennis* for the United States. Reported below: 100 F. 2d 691.

No. 579. PIKE RAPIDS POWER CO. *v.* MINNEAPOLIS, ST. P. & S. S. M. RY. CO. February 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James G. Nye* for petitioner. *Mr. John L. Erdall* for respondent. Reported below: 99 F. 2d 902.

No. 583. PENNSYLVANIA RAILROAD CO. *v.* TOBIN. February 13, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill, R. Aubrey Bogley,* and *Henry Wolf Bikle* for petitioner. *Mr. Rossa F. Downing* for respondent. Reported below: 100 F. 2d 435.

No. 588. UNITED STATES EX REL. CROMWELL *v.* DOYLE, PRESIDENT, BOARD OF EDUCATION, ET AL. February 13, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. William E. Leahy, William J. Hughes, Jr., James A. Cobb,* and *Perry W. Howard* for petitioner. *Messrs. Elwood H. Seal* and *Vernon E. West* for respondents. Reported below: 69 App. D. C. 215; 99 F. 2d 448.

No. 652. VEAL *v.* UNITED STATES. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Robert Burrow* for petitioner. No appearance for the United States. Reported below: 97 F. 2d 1021.

No. 690. EDDY *v.* HUNT, WARDEN. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Charles Eddy, pro se.* No appearance for respondent.

No. 585. S. S. KRESGE CO. *v.* AMSLER ET AL. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. Wayne Ely, John S. Leahy,* and *Lambert E. Walther* for petitioner. *Mr. James R. Claiborne* for respondents. Reported below: 99 F. 2d 503.

Nos. 592 and 593. MANHATTAN RAILWAY CO. ET AL. *v.* MERLE-SMITH ET AL. February 27, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE took no part in the consideration and decision of this application. *Messrs. William V. Hodges, Charles Franklin, Frank C. Laughlin, John B. Doyle,* and *Rayford W. Alley* for petitioners. *Messrs. Boykin C. Wright* and *Clifton Murphy* for respondents. Reported below: 99 F. 2d 789.

No. 597. FAHEY, RECEIVER, ET AL. *v.* COOK ET AL. February 27, 1939. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is denied. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Messrs. Samuel E. Hirsch, William M. Klein, Lewis C. Jesseph,* and *Ralph R. Hauxhurst* for respondents. Reported below: 101 F. 2d 394.

No. 564. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. February 27, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ralph H. Case, James S. Y. Ivins,* and *Richard B. Barker* for petitioner. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. C. W. Leaphart* for the United States. Reported below: 86 Ct. Cls. 299.

No. 589. ARK ET AL. *v.* FANSTEEL METALLURGICAL CORP. February 27, 1939. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Lee Pressman, George B. Gillespie,* and *Edmund Burke* for petitioners. *Messrs. Benjamin V. Becker, Max Swiren,* and *Sidney Block* for respondent. Reported below: 295 Ill. App. 323; 14 N. E. 2d 991.

No. 596. WESTCHESTER COUNTY *v.* SOUND MARINE & MACHINE CORP. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William A. Davidson* and *Frank J. Claydon* for petitioner. *Mr. James H. Hickey* for respondent. Reported below: 100 F. 2d 360.

No. 600. In re Clayton C. Gilliland. February 27, 1939. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Thomas W. Payne* for petitioner. *Messrs. George H. Heideman, Thomas Read,* Attorney General of Michigan, and *Edmund E. Shephard,* Assistant Attorney General, in opposition. Reported below: 284 Mich. 604; 280 N. W. 63.

No. 602. Northern Trust Co., Executor, et al. *v.* Edenborn. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. L. Herold* for petitioners. *Messrs. R. E. Milling, A. B. Freyer,* and *R. C. Milling* for respondent. Reported below: 98 F. 2d 657.

No. 542. Lee, Warden, *v.* Pero et al. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Orland S. Loomis* and *Joseph E. Messerschmidt* for petitioner. No appearance for respondents. Reported below: 99 F. 2d 28.

No. 594. American Potash & Chemical Corp. *v.* National Labor Relations Board. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. S. M. Haskins* and *Edmund M. Toland* for petitioner. *Solicitor General Jackson,* and *Messrs. Charles A. Horsky, Charles Fahy, Robert B. Watts,* and *Mortimer B. Wolf* for respondent. Reported below: 98 F. 2d 488.

No. 599. Cowherd *v.* Phoenix Joint Stock Land Bank et al. February 27, 1939. Petition for writ of

certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William Lemke* and *William A. Franken* for petitioner. *Messrs. John F. Reinhardt* and *Stonewall J. Jones* for respondents. Reported below: 99 F. 2d 225.

No. 601. DIVACK *v.* GOLDBERG, TRUSTEE IN BANKRUPTCY. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. *Mr. Charles Goldberg, pro se.* Reported below: 100 F. 2d 1016.

No. 604. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* DEWALT. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Mitchel J. Henderson* for petitioner. No appearance for respondent. Reported below: 99 F. 2d 846.

No. 607. HERRING *v.* ALABAMA GREAT SOUTHERN R. CO. February 27, 1939. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Geo. Lewis Bailes* for petitioner. *Messrs. S. P. Smith, J. T. Stokely, Sidney S. Alderman,* and *S. R. Prince* for respondent. Reported below: 236 Ala. 618; 184 So. 180.

No. 610. HUDSON *v.* COMMISSIONER OF INTERNAL REVENUE. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Sam Costen* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 99 F. 2d 630.

No. 611. HERZBERG'S, INC. *v.* OCEAN ACCIDENT & GUARANTEE CORP. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Sam Beber* for petitioner. *Messrs. J. A. C. Kennedy, R. E. Svoboda,* and *E. J. Svoboda* for respondent. Reported below: 100 F. 2d 171.

No. 618. JUMP ET AL. *v.* ELLIS, SUPERINTENDENT OF OSAGE INDIAN AGENCY. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Neal E. McNeill* for petitioners. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. C. W. Leaphart* for respondent. Reported below: 100 F. 2d 130.

No. 620. HARRIS, PRESIDENT OF CALCOCRAFT, *v.* NATIONAL LABOR RELATIONS BOARD. February 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward W. Hamilton* for petitioner. *Solicitor General Jackson,* and *Messrs. W. Marvin Smith, Charles Fahy, Robert B. Watts,* and *Mortimer B. Wolf* for respondent. Reported below: 100 F. 2d 197.

Nos. 621, 622 and 623. ATLANTIC COAST LINE CO. *v.* UNITED STATES. February 27, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Carl H. Davis, Robert R. Faulkner,* and *J. Crossan Cooper, Jr.* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Earl C. Crouter* for the United States. Reported below: 99 F. 2d 6, 932.

No. 504. CARLISLE LUMBER CO. *v.* NATIONAL LABOR RELATIONS BOARD. March 6, 1939. Motion to consider the petition on the typewritten record granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles H. Paul, George Donworth,* and *Charles T. Donworth* for petitioner. *Solicitor General Jackson,* and *Messrs. Charles A. Horsky, Charles Fahy,* and *Robert B. Watts* for respondent. Reported below: 99 F. 2d 533.

No. 616. NELSON *v.* DARLEY ET AL. March 6, 1939. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Messrs. Charles L. Rowe* and *Jack Crenshaw* for petitioner. *Messrs. Walter J. Knabe* and *Richard T. Rives* for respondents. Reported below: 236 Ala. 463; 183 So. 447.

No. 617. PENNSYLVANIA SALT MANUFACTURING CO. *v.* UNITED STATES. March 6, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Robert T. McCracken* for petitioner. *Solicitor General Jackson* and *Mr. John R. Benney* for the United States. Reported below: 26 C. C. P. A. (Cust.) 232.

No. 619. KENNESAW MOUNTAIN BATTLEFIELD ASSN. ET AL. *v.* UNITED STATES. March 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sam Hewlett, Walter Dillon,* and *James F. Kemp* for petitioners. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. C. W. Leaphart* for the United States. Reported below: 99 F. 2d 830.

No. 625. TRUSTEES OF LUMBER INVESTMENT ASSN. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. March 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William D. Mitchell, William S. Bennet, Rollin Browne,* and *Allin H. Pierce* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *S. Dee Hanson* for respondent. Reported below: 100 F. 2d 18.

No. 637. SIMMONS ET AL. *v.* TOOHEY; and

No. 638. SMITH *v.* SCHWIER. March 6, 1939. Petition for writs of certiorari to the Supreme Court of Ohio denied. *Mr. George S. Hawke* for petitioners. No appearance for respondents. Reported below: 134 Ohio St. 358; 17 N. E. 270.

No. 639. BAJORAS *v.* UNITED STATES. March 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry A. Estep* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 100 F. 2d 1009.

No. 642. PICKETT *v.* UNITED STATES. March 6, 1939. Petition for writ of certiorari to the Circut Court of Appeals for the Eighth Circuit denied. *Mr. H. C. Kilpatrick* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for the United States. Reported below: 100 F. 2d 909.

No. 656. Ocean City *v.* Federal Reserve Bank of Philadelphia. March 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George Wharton Pepper* for petitioner. *Mr. Yale L. Schekter* for respondent. Reported below: 100 F. 2d 1011.

No. 658. Fidelity & Columbia Trust Co., Executor, *v.* United States. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. Mr. Justice Reed took no part in the consideration and decision of this application. *Messrs. A. Shelby Winstead* and *Ernest Woodward* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 100 F. 2d 215.

Nos. 614 and 615. Farmers' Loan & Trust Co., Trustee, et al. *v.* Bowers, Executor. March 13, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr. Justice Reed took no part in the consideration or decision of these cases. *Messrs. John W. Davis, C. Alexander Capron, Charles Angulo,* and *Philip M. Payne* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. William Stanley, Sewall Key, Carlton Fox,* and *Charles A. Horsky* for respondent. Reported below: 98 F. 2d 794.

No. 630. Wick et al., Trustees, *v.* New Jersey. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Earl F. Reed* and *Charles M. Thorp, Jr.* for peti-

tioners. *Messrs. John E. Evans, Jr.* and *Charles J. Margiotti* for respondent. Reported below: 100 F. 2d 147.

No. 632. LARGE ET AL., EXECUTORS, *v.* SHIVELY. March 13, 1939. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. John B. Shorett* for petitioners. *Mr. Frank R. Jeffrey* for respondent. Reported below: 194 Wash. 608; 79 P. 2d 317; 82 P. 2d 793.

No. 635. DUQUESNE CLUB *v.* UNITED STATES. March 13, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George B. Furman* and *Paul Armitage* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 87 Ct. Cls. 483; 23 F. Supp. 781.

No. 640. TROUTMAN *v.* UNITED STATES; and

No. 641. YOUNG *v.* SAME. March 13, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Theodore Epstein* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, J. Albert Woll, William J. Connor,* and *W. Marvin Smith* for the United States. Reported below: 100 F. 2d 490.

No. 644. MARTIN *v.* UNITED STATES;

No. 645. BROWN *v.* SAME;

No. 646. HERRING *v.* SAME;

No. 647. ALLBEE *v.* SAME; and

No. 648. BERNS *v.* SAME. March 13, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Jean S. Breitenstein* for

petitioners. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Mr. Elmer B. Collins* for the United States. Reported below: 100 F. 2d 490.

No. 657. Pacific Mutual Life Insurance Co. *v.* Goss, Administratrix. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Grover Middlebrooks* for petitioner. *Mr. J. C. Murphy* for respondent. Reported below: 99 F. 2d 658.

No. 662. Springfield et al. *v.* United States. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Charles H. Beckwith* for petitioner. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. C. W. Leaphart* for the United States. Reported below: 99 F. 2d 860.

No. 664. Hawke *v.* Servicised Products Corp. et al. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George S. Hawke* for petitioner. *Messrs. Franklin R. Overmyer* and *Adelor J. Petit, Jr.,* for respondents. Reported below: 95 F. 2d 710.

No. 665. Texas Cities Gas Co. *v.* El Paso et al. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Roy C. Coffee, Marshall Newcomb,* and *Wm. H. Burges* for petitioner. No appearance for respondents. Reported below: 100 F. 2d 501.

No. 667. LEHIGH VALLEY R. CO. ET AL. *v.* MARTIN, STATE TAX COMM'R, ET AL.;

Nos. 668 and 669. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* SAME;

No. 670. DELAWARE, L. & W. R. Co. *v.* SAME;

No. 671. NEW YORK CENTRAL R. Co. *v.* SAME;

No. 672. NEW JERSEY & NEW YORK R. Co. *v.* SAME;

No. 673. NEW YORK, S. & W. R. Co. *v.* SAME;

No. 674. ERIE R. Co. *v.* SAME; and

No. 675. LEHIGH VALLEY R. Co. *v.* SAME. March 13, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Jacob Aronson, Richard W. Barrett, Herbert A. Taylor, Maximillian M. Stallman, Alexander H. Elder,* and *T. R. White* for petitioners. *Messrs. David T. Wilentz* and *Duane E. Minard* for respondents. Reported below: 100 F. 2d 139.

No. 686. GREEN *v.* GREEN. March 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. E. T. Young* for petitioner. *Mr. George Francis* for respondent. Reported below: 100 F. 2d 241.

No. 654. MCMENUS *v.* UNITED STATES. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Oral V. McMenus, pro se.* No appearance for the United States. Reported below: 100 F. 2d 490.

No. 684. KONTOVICH *v.* UNITED STATES. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave

to proceed further *in forma pauperis,* denied. *Frank T. Kontovich, pro se.* No appearance for the United States. Reported below: 99 F. 2d 661.

No. 711. ARMSTRONG, EXECUTOR, *v.* NEW YORK CITY. March 27, 1939. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Charles V. Halley, Jr.* for petitioner. No appearance for respondent.

No. 739. COWEN *v.* CALIFORNIA ET AL. March 27, 1939. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Earl S. Cowen, pro se.* No appearance for respondents. Reported below: 20 Cal. 2d 674; 67 P. 2d 737.

No. 740. EASON *v.* SANFORD, WARDEN. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *George W. Eason, pro se.* No appearance for respondent. Reported below: 100 F. 2d 1013.

No. 682. THOMPSON, TRUSTEE, *v.* TERMINAL SHARES, INC., ET AL.; and

No. 736. TOMLINSON ET AL. *v.* THOMPSON, TRUSTEE. March 27, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of these applications. *Mr. R. B. Caldwell* for petitioner in No. 682. *Messrs. Clan Crawford, Howard*

F. Burns, and *Jacob M. Lashly* for petitioners in No. 736. *Messrs. William B. Cockley, Godfrey Goldmark,* and *Henry N. Ess* for respondents. Reported below: 24 F. Supp. 729.

No. 634. LUCCHI ET AL. *v.* UNITED STATES; and

No. 655. UNITED STATES *v.* INTERNATIONAL FUR WORKERS UNION ET AL. March 27, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph A. Padway* for petitioners in No. 634. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Mr. M. S. Huberman* for the United States. *Mr. Joseph G. M. Browne* for respondents in No. 655. Reported below: 100 F. 2d 541.

No. 649. UNION JOINT STOCK LAND BANK *v.* BYERS, ET AL. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. A. G. Masters* for petitioner. *Mr. Dean D. Sturgis* for respondents. Reported below: 100 F. 2d 82.

No. 653. COOS (OR KOWES) BAY, LOWER UMPQUA (KALAWATSET), AND SINSLAW INDIAN TRIBES *v.* UNITED STATES. March 27, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Daniel B. Henderson* and *T. Hardy Todd* for petitioners. *Solicitor General Jackson, Assistant Attorney General McFarland,* and *Mr. C. W. Leaphart* for the United States. Reported below: 87 Ct. Cls. 143.

No. 659. HAMILTON NATIONAL BANK *v.* UNITED STATES. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. W. K. Meacham* for petitioner. *Solicitor*

General Jackson, Assistant Attorney General Morris, and *Messrs. Sewall Key* and *Lee A. Jackson* for the United States. Reported below: 99 F. 2d 570.

No. 663. JACOBS *v.* MERCHANTS FIRE ASSURANCE CORP. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. C. Wheeler* for petitioner. *Mr. Grover Middlebrooks* for respondent. Reported below: 99 F. 2d 655.

No. 677. LOWRY *v.* WOODRING, SECRETARY OF WAR. March 27, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Philip W. Lowry, pro se. Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 101 F. 2d 673.

No. 681. THRASH LEASE TRUST *v.* COMMISSIONER OF INTERNAL REVENUE. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas R. Dempsey, A. Calder Mackay,* and *Herbert R. MacMillan* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, L. W. Post,* and *Charles A. Horsky* for respondent. Reported below: 99 F. 2d 925.

No. 683. KENT, RECEIVER, *v.* CLEVELAND NATIONAL BANK. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George P. Barse, Estes Kefauver,* and *Phil B. Whitaker* for petitioner. *Mr. Frank Spurlock* for respondent. Reported below: 100 F. 2d 54.

No. 688. BEARD *v.* SANFORD, WARDEN. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James J. Laughlin* and *Ellis Klein* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon, William W. Barron,* and *W. Marvin Smith* for respondent. Reported below: 99 F. 2d 750.

No. 691. HOLMES *v.* COMMISSIONER OF INTERNAL REVENUE. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles B. McInnis* and *Randolph E. Paul* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Earl C. Crouter* and *Charles A. Horsky* for respondent. Reported below: 99 F. 2d 822.

No. 689. TEXAS & PACIFIC RY. CO. ET AL. *v.* SONKEN-GALAMBA CORP. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. G. B. Ross, R. S. Outlaw, T. D. Gresham,* and *Charles H. Woods* for petitioners. *Messrs. I. J. Ringolsky, Wm. G. Boatright, Harry L. Jacobs,* and *Bernard L. Glover* for respondent. Reported below: 100 F. 2d 158.

No. 697. NORDRED REALTIES, INC. *v.* LANGLEY. March 27, 1939. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Nathan Ottinger* for petitioner. No appearance for respondent. Reported below: 279 N. Y. 636; 7 N. Y. S. 2d 903; 169 Misc. 659; 18 N. E. 2d 38.

No. 698. GRIFFIN *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK ET AL. March 27, 1939. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. William H. Griffin, Jr.* for petitioner. *Mr. Einar Chrystie* for respondents. Reported below: 253 App. Div. 288; 254 *id.* 660, 844; 278 N. Y. 708; 2 N. Y. S. 2d 36; 4 N. Y. S. 2d 377; 6 N Y. S. 2d 338; 16 N. E. 2d 853.

No. 699. SOUTHERN PACIFIC CO. *v.* HOSMAN. March 27, 1939. Petition for writ of certiorari to the District Court of Appeal, First Appellate District, of California, denied. *Mr. Arthur B. Dunne* for petitioner. *Mr. Louis E. Goodman* for respondent. Reported below: 28 Cal. App. 2d 621; 83 P. 2d 88.

No. 703. KITE, ADMINISTRATRIX, *v.* FISHEL. March 27, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Daniel Thew Wright* for petitioner. *Mr. Irwin Geiger* for respondent. Reported below: 101 F. 2d 685.

No. 727. ZENITH RADIO CORP. *v.* HAZELTINE CORPORATION. March 27, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Irving Herriott* and *W. Ward Smith* for petitioner. *Messrs. Edward H. McDermott, Paul Armitage,* and *Elwood Hansmann* for respondent. Reported below: 100 F. 2d 10.

No. 700. MISSISSIPPI COTTONSEED PRODUCTS CO. ET AL. *v.* STONE, TAX COMMISSIONER, ET AL. April 3, 1939. Petition for writ of certiorari to the Supreme Court of

Mississippi denied. *Messrs. Garner W. Green, Forrest B. Jackson,* and *Marcellus Green* for petitioners. No appearance for respondents. Reported below: 184 Miss. —; 184 So. 428.

No. 705. SHAPIRO *v.* UNITED STATES. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Michael Shapiro, pro se. Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 101 F. 2d 375.

No. 706. WALKER *v.* WALKER. April 3, 1939. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Weightstill Woods* for petitioner. *Mr. James A. O'Callaghan* for respondent. Reported below: 369 Ill. 627; 17 N. E. 2d 567.

No. 709. KARDON *v.* WILLING, RECEIVER. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry Arronson* for petitioner. No appearance for respondent. Reported below: 102 F. 2d 957.

No. 710. ATCHISON, T. & S. F. RY. CO. *v.* SUPERIOR COURT OF CALIFORNIA ET AL. April 3, 1939. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Robert Brennan, Mark Webster Reed, Leo E. Sievert,* and *Harley Kellogg Lockwood* for petitioner. *Mr. Louis E. Goodman* for respondents. Reported below: 12 Cal. 2d 549; 86 P. 2d 85.

No. 712. KANSAS CITY SOUTHERN RY. CO. *v.* WESTVILLE. April 3, 1939. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. Frank H. Moore, James B. McDonough,* and *Joseph R. Brown* for petitioner. *Mr. Saul J. Gordon* for respondent. Reported below: 184 Okla. 100; 89 P. 2d 320.

No. 714. NORTH SHORE DELIVERY CO. *v.* UNIVERSAL INDEMNITY INSURANCE CO. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Alfred O. Erickson* for petitioner. *Mr. Arthur S. Lytton* for respondent. Reported below: 100 F. 2d 618.

No. 716. MYKLEBUST ET AL. *v.* MEIDELL, MASTER AND CLAIMANT OF THE ESTRALLA. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Philip Dorfman* for petitioners. *Mr. John B. Shaw* for respondent. Reported below: 102 F. 2d 736.

No. 723. UWANAWICH *v.* UNITED STATES. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Gordon Battle* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon, William W. Barron,* and *W. Marvin Smith* for the United States. Reported below: 102 F. 2d 45.

No. 725. OCEAN ACCIDENT & GUARANTEE CORP. *v.* SOUTHWESTERN BELL TELEPHONE CO. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John T.*

Harding and *D. A. Murphy* for petitioner. *Messrs. Walter A. Raymond* and *Fenton Hume* for respondent. Reported below: 100 F. 2d 441.

No. 726. TENNESSEE PUBLISHING CO. *v.* CARPENTER, RECEIVER. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Jordon Stokes, Jr.* for petitioner. *Mr. Cecil Sims* for respondent. Reported below: 100 F. 2d 728.

No. 730. PRATT *v.* SHELL PETROLEUM CORP. April 3, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Mark H. Adams* for petitioner. *Messrs. Guy A. Thompson* and *Samuel A. Mitchell* for respondent. Reported below: 100 F. 2d 833.

No. 694. GABRIELLI *v.* KNICKERBOCKER ET AL. See *ante,* p. 621.

No. 516. GOINS *v.* UNITED STATES. See *ante,* p. 622.

No. 814. KORTE *v.* MORTFORT, TRUSTEE. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. U. S. Lesh* for petitioner. No appearance for respondent. Reported below: 100 F. 2d 615.

No. 741. MITCHELL *v.* GREENOUGH ET AL. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied.

Walter B. Mitchell, pro se. No appearance for respondents. Reported below: 100 F. 2d 184, 1006.

No. 747. KAY *v.* UNITED STATES. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Frank Serri* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, M. Joseph Matan,* and *W. Marvin Smith* for the United States. Reported below: 101 F. 2d 270.

No. 755. NORMAN *v.* UNITED STATES. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. L. E. Gwinn* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 100 F. 2d 905.

No. 843. WEST *v.* WASHINGTON. April 17, 1939. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Fred Hartzell West, pro se.* No appearance for respondent. Reported below: 97 Wash. Dec. 510; 86 P. 2d 192.

No. 852. SWAIN *v.* INDIANA. April 17, 1939. Petition for writ of certiorari to the Supreme Court of Indiana, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Richard E. Westbrooks* for petitioner. *Mr. Rexell A. Boyd* for respondent. Reported below: 214 Ind. 412; 215 Ind. —; 15 N. E. 2d 381; 18 N. E. 2d 921.

Nos. 692 and 693. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ASHLAND OIL & REFINING CO.; and

Nos. 757 and 758. ASHLAND OIL & REFINING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 17, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of these applications. *Solicitor General Jackson* for the Commissioner of Internal Revenue. *Messrs. John W. Davis* and *John E. McClure* for the Ashland Oil & Refining Co. Reported below: 99 F. 2d 588.

No. 756. NEW YORK CITY ET AL. *v.* CENTRAL SAVINGS BANK ET AL. April 17, 1939. Petition for a writ of certiorari to the Supreme Court of New York denied for the reason that the judgment sought to be reviewed rests upon a nonfederal ground adequate to support it. *Lynch* v. *New York,* 293 U. S. 52; *Honeyman* v. *Hanan,* 300 U. S. 14, 18–19. *Messrs. William C. Chanler* and *Paxton Blair* for petitioners. *Messrs. A. Henry Mosle* and *Jesse Knight* for respondents. Reported below: 254 App. Div. 502; 279 N. Y. 266; 280 N. Y. 9; 5 N. Y. S. 2d 451; 18 N. E. 2d 151; 19 N. E. 2d 659.

No. 678. WEINBERG *v.* UNITED STATES; and

No. 679. STRAUS ET AL. *v.* UNITED STATES. April 17, 1939. Petition for writs of certiorari to the Court of Claims denied. *Mr. C. Leo De Orsey* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 87 Ct. Cls. 497, 506; 25 F. Supp. 88.

No. 680. UNITED STATES *v.* H. B. NELSON CONSTRUCTION CO. April 17, 1939. Petition for writ of certiorari

to the Court of Claims denied. *Solicitor General Jackson* for the United States. *Mr. S. Wallace Dempsey* for respondent. Reported below: 87 Ct. Cls. 375.

No. 718. West *v.* Birmingham. April 17, 1939. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Mr. Walter S. Smith* for petitioner. No appearance for respondent. Reported below: 236 Ala. 434; 183 So. 421.

No. 719. Boston & Maine Railroad *v.* Williams et al.; and

No. 724. Bernardi Greater Shows, Inc. *v.* Boston & Maine Railroad. April 17, 1939. Petitions for writs of certiorari to the Supreme Court of New Hampshire denied. *Mr. George T. Hughes* for petitioner in No. 719 and respondent in No. 724. *Mr. Robert W. Upton* for respondents in No. 719 and petitioner in No. 724. Reported below: 89 N. H. 490; 1 A. 2d 360.

No. 729. M. Rich & Brothers Co. *v* First National Bank of Atlanta et al., Executors. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harold Hirsch, Marion Smith,* and *M. E. Kilpatrick* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Charles A. Horsky* for respondents. Reported below: 99 F. 2d 607.

No. 731. Minnesota Mining & Manufacturing Co. *v.* Coe, Commissioner of Patents. April 17, 1939. Petition for writ of certiorari to the Court of Appeals for

the District of Columbia denied. *Messrs. Paul Carpenter, William H. Abbott,* and *Laurence B. Dodds* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *R. F. Whitehead* for respondent. Reported below: 69 App. D. C. 256; 100 F. 2d 429.

Nos. 734 and 735. HERMAN, EXECUTOR, *v.* HENLEY, TRUSTEE IN BANKRUPTCY. April 17, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry L. Jacobs* for petitioner. *Mr. Frank P. Barker* for respondent. Reported below: 101 F. 2d 365.

No. 737. ROGERS ET AL. *v.* MONTGOMERY WARD & Co. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. E. L. Gavin, H. M. Jackson,* and *W. H. Yarborough* for petitioners. *Mr. Wm. Nevarre Cromwell* for respondent. Reported below: 100 F. 2d 721.

No. 743. RANDOLPH LUMBER CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William S. Bennet* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 100 F. 2d 18.

No. 744. MATHEWSON, ADMINISTRATOR, ET AL. *v.* FIRST TRUST CO. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth

Circuit denied. *Mr. Jacob A. Overlander* for petitioners. *Mr. K. B. Randolph* for respondent. Reported below: 100 F. 2d 121.

No. 732. MOORE *v.* UNITED STATES. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Maxwell Shapiro* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, J. Albert Woll, William J. Connor,* and *W. Marvin Smith* for the United States. Reported below: 101 F. 2d 56.

No. 733. ESTATE OF ORR ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward J. Prest* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for respondent. Reported below: 101 F. 2d 539.

No. 752. FIDELITY & CASUALTY CO. *v.* PADDLEFORD ET AL.; and

No. 753. HARTFORD ACCIDENT & INDEMNITY CO. *v.* SAME. April 17, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. F. Dammann* for petitioners. *Mr. Miles G. Seeley* for respondents. Reported below: 100 F. 2d 606.

No. 759. GAMBLE, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Elden McFarland* and *Ike*

Lanier for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Warren F. Wattles,* and *Lee A. Jackson* for respondent. Reported below: 101 F. 2d 565.

No. 774. EVANS *v.* KANSAS GAS & ELECTRIC CO. April 17, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Claude I. Depew* and *Austin M. Cowan* for petitioner. *Mr. Blatchford Downing* for respondent. Reported below: 100 F. 2d 549.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 17, 1939, THROUGH APRIL 17, 1939.

No. 624. DAVIES *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. Appeal from the Supreme Court of Washington. January 30, 1939. Docketed and dismissed on motion of counsel for the appellees. No appearance for appellant. *Mr. E. D. Weller* for appellees. Reported below: 191 Wash. 459; 71 P. 2d 552.

No. 191. GOODYEAR TIRE & RUBBER CO. *v.* OVERMAN CUSHION TIRE CO.; and

No. 200. OVERMAN CUSHION TIRE CO. *v.* GOODYEAR TIRE & RUBBER CO. On petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit. January 30, 1939. Dismissed on motion of counsel for the petitioners. *Messrs. Arthur C. Denison* and *Frank O. Richey* for petitioner in No. 191 and respondent in No. 200. *Mr. Robert W. Byerly* for respondent in No. 191 and petitioner in No. 200. Reported below: 95 F. 2d 978.

No. 631. LICHTENSTEIN ET AL. *v.* FLORIDA DRY CLEANING & LAUNDRY BOARD. On petition for writ of certiorari to the Supreme Court of Florida. February 6, 1939. Dismissed on motion of counsel for petitioners. *Messrs. E. F. P. Brigham* and *Vincent C. Giblin* for petitioners. No appearance for respondent. Reported below: 133 Fla. 588; 183 So. 162.

No. 728. CHAMBERS *v.* NORTH DAKOTA. Appeal from the Supreme Court of North Dakota. March 6, 1939. Docketed and dismissed on motion of counsel for the appellee. No appearance for appellant. *Mr. P. O. Sathre* for appellee. Reported below: 68 N. D. 410; 280 N. W. 196.

No. 606. SANTA MONICA MOUNTAIN PARK CO. *v.* UNITED STATES. On writ of certiorari, *ante,* p. 624, to the Circuit Court of Appeals for the Ninth Circuit. March 29, 1939. Dismissed per stipulation of counsel. *Messrs. John B. Milliken, Claude I. Parker,* and *L. A. Luce* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *W. Croft Jennings* for the United States. Reported below: 99 F. 2d 450.

PETITIONS FOR REHEARING GRANTED, FROM JANUARY 17, 1939, THROUGH APRIL 17, 1939.

No. 76. MAYTAG COMPANY *v.* HURLEY MACHINE CO. ET AL.; and

No. 77. SAME *v.* EASY WASHING MACHINE CORP. February 6, 1939. Motion for leave to file petition for rehearing granted; and petition for rehearing granted. The orders denying certiorari (305 U. S. 599) are vacated, and the petition for writs of certiorari to the Circuit

Court of Appeals for the Second Circuit is granted. *Messrs. Thomas G. Haight, Wallace R. Lane, Nelson E. Johnson, Oscar W. Jeffery,* and *Benton Baker* for petitioner. *Messrs. William H. David* and *Dean S. Edmonds* for respondents. Reported below: 96 F. 2d 87. See also 305 U. S. 599.

PETITIONS FOR REHEARING DENIED, FROM JANUARY 17, 1939, THROUGH APRIL 17, 1939.*

No. 189. LYON *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. January 30, 1939. 305 U. S. 484.

No. 467. MARKET STREET RAILWAY CO. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. Jan. 30, 1939. 305 U. S. 657.

No. 522. WHITMER *v.* ILLINOIS. January 30, 1939. 305 U. S. 576.

No. 511. DOAK *v.* FEDERAL LAND BANK OF BALTIMORE. January 30, 1939. 305 U. S. 655.

No. 510. JENKINS PETROLEUM PROCESS CO. *v.* SINCLAIR REFINING CO. February 6, 1939. 305 U. S. 659.

No. 513. POTTS *v.* FLIPPEN, ADMINISTRATOR, ET AL. February 13, 1939. 305 U. S. 662.

No. 519. MINNEAPOLIS, ST. P. & S. S. M. RY. CO. *v.* PIKE RAPIDS POWER CO. February 13, 1939. 305 U. S. 660.

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 523. EPPENAUER ET AL. *v.* OHIO OIL CO. (MARATHON OIL CO., ORIGINAL PLAINTIFF). February 27, 1939.

No. 532. DEPPE *v.* GENERAL MOTORS CORP. February 27, 1939.

No. 547. OHIO EX REL. GREEN *v.* KING, CLERK, ET AL. February 27, 1939. 305 U. S. 661.

No. 127. MACKAY RADIO & TELEGRAPH CO. *v.* RADIO CORPORATION OF AMERICA. See *ante*, p. 618.

No. 556. RYAN *v.* UNITED STATES. March 6, 1939.

No. 571. COOK *v.* LEWIS ET AL. March 6, 1939.

No. 222. WASHINGTONIAN PUBLISHING CO. *v.* PEARSON ET AL. March 13, 1939. *Ante*, p. 30.

No. 489. EASTERN SHORE PUBLIC SERVICE CO. ET AL. *v.* SEAFORD. March 13, 1939.

No. 636. STREWL ET AL. *v.* UNITED STATES. March 13, 1939.

No. —, Original. EX PARTE ALBERT LEIGHTON. March 27, 1939. 305 U. S. 579.

No. 360. UNITED STATES *v.* TOWERY. March 27, 1939. *Ante*, p. 324.

No. 588. UNITED STATES EX REL. CROMWELL *v.* DOYLE, PRESIDENT, BOARD OF EDUCATION, ET AL. March 27, 1939.

No. 600. IN RE CLAYTON C. GILLILAND. March 27, 1939.

No. 620. HARRIS, PRESIDENT OF CALCOCRAFT, *v.* NATIONAL LABOR RELATIONS BOARD. March 27, 1939.

No. 665. TEXAS CITIES GAS CO. *v.* EL PASO ET AL. March 27, 1939.

No. —. HARRIS *v.* NATIONAL MEDIATION BOARD. April 3, 1939.

No. 426. MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS. April 3, 1939. *Ante,* p. 346.

No. 367. EICHHOLZ *v.* PUBLIC SERVICE COMM'N OF MISSOURI ET AL. See *ante,* p. 622.

No. 599. COWHERD *v.* PHOENIX JOINT STOCK LAND BANK ET AL. April 17, 1939.

No. 605. PUBLIC SERVICE COMM'N OF MISSOURI ET AL. *v.* BRASHEAR FREIGHT LINES, INC., ET AL. April 17, 1939. *Ante,* p. 204.

No. 667. LEHIGH VALLEY R. CO. ET AL. *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 668. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 669. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 670. DELAWARE, L. & W. R. CO. *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 671. NEW YORK CENTRAL R. CO. *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 672. NEW JERSEY & NEW YORK R. CO. *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 673. NEW YORK, S. & W. R. CO. *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 674. ERIE R. CO. *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

No. 675. LEHIGH VALLEY R. CO. *v.* MARTIN, STATE TAX COMMISSIONER, ET AL. April 17, 1939.

REVISED RULES

of the

Supreme Court of the United States

Adopted February 13, 1939. Effective February 27, 1939.

(The Acts of February 13, 1925, c. 229, 43 Stat. 936, January 31, 1928, c. 14, 45 Stat. 54, April 26, 1928, c. 440, 45 Stat. 466, and August 24, 1937, c. 754, 50 Stat. 751, are printed in an Appendix.)

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REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Adopted February 13, 1939. Effective February 27, 1939.

(The Acts of February 13, 1925, c. 229, 43 Stat. 936; January 31, 1928, c. 14, 45 Stat. 54; April 26, 1928, c. 440, 45 Stat. 466; and August 24, 1937, c. 754, 50 Stat. 751 are printed in an Appendix.)

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counsellor in any court, while he continues in office.

2. The clerk shall not permit any original record or paper to be taken from the office without an order from the court or one of the justices, except as provided by Rule 13, paragraph 4.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, or Insular Possession, and that their private and professional characters shall appear to be good.

2. Not less than two weeks in advance of application for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the

proper court showing that he possesses the foregoing qualifications, (2) his personal statement under oath setting out the date and place of his birth, the names of his parents, his place of residence and office address, the courts of last resort to which he has been admitted, the places where he has been a practitioner, and, if he is not a native born citizen, the date and place of his naturalization, and information respecting any reprimand of any court pertaining to his conduct or fitness as a member of the bar, and (3) two letters or signed statements of members of the bar of this court, not related to the applicant, who are resident practitioners within the State, Territory, District, or Insular Possession (to which the application refers as provided in paragraph 1 of this rule) stating that the applicant is personally known to them, that he possesses all the qualifications required for admission to the bar of this court, that they have examined his personal statement and that they affirm that his personal and professional character and standing are good.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he has examined the credentials of the applicant filed in the office of the clerk in accordance with the foregoing requirement and that he is satisfied that the applicant possesses the necessary qualifications.

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz:

I, ——— ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

5. Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him

at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred.

3.

CLERKS TO JUSTICES NOT TO PRACTICE.

No one serving as a law clerk or secretary to a member of this court shall practice as an attorney or counsellor in any court while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court, or permit his name to appear on a brief filed in this court, until two years shall have elapsed after such separation.

4.

THE LIBRARY.

1. The library for the bar shall be open to members of the bar of this court; to members of Congress and to law officers of the executive or other departments of the Government, but books may not be removed from the building.

2. The library shall be open during such times as the reasonable needs of the bar require and be governed by such regulations as the librarian, with the approval of the court, may make effective.

5.

ORIGINAL ACTIONS.

Cases on the original docket shall be governed, as far as may be, by the rules applicable to cases on the appellate docket.

The initial pleading in any such action may be accompanied by a brief and shall be prefaced by a motion for leave to file, which motion will be presented to the court

by the clerk on the first motion day following its lodgment in the clerk's office. If leave to file is granted the case will be placed on the original docket and the parties shall make such cash deposit with the clerk for the payment of his fees as he may require.

Additional pleadings shall be filed as the court directs.

6.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney general, of such State.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of such process; and if the defendant, on such service of the subpœna, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

7.

MOTIONS—INCLUDING THOSE TO DISMISS OR AFFIRM—SUMMARY DOCKET—MOTION DAY.

1. Every motion to the court shall be printed, and shall state clearly its object and the facts on which it is based.

2. Oral argument will not be heard on any motion unless the court specially assigns it therefor, when not exceeding one-half hour on each side will be allowed.

3. No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

A motion by appellee to dismiss an appeal will be received in advance of the court's ruling upon the jurisdictional statements only when presented in the manner provided by Rule 12, paragraph 3. When such a motion is made, the appellant shall have 20 days after service upon him within which to file in this court 40 printed copies of a brief opposing the motion, except that where his counsel resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, the time shall be 25 days.

A motion by respondent to dismiss a writ of certiorari or by appellee to dismiss an appeal, after the court has ruled upon the jurisdictional statements and accompanying motions, if any (Rule 12, par. 5), will be received if not based upon grounds already advanced in opposition to the granting of the writ of certiorari or to the noting of jurisdiction of the appeal. Such motions, together with motions to dismiss certificates in case of questions certified, must be printed and 40 copies thereof must be filed with the clerk, accompanied by proof that a copy of the motion, and accompanying brief, if any, have been served upon counsel of record for the opposing party. The opposing party shall have 20 days from the date of such service within which to file a printed brief opposing the motion. When counsel for the opposing party resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, Montana, or an outlying possession, the time shall be 25 days. Upon the filing of the opposing brief, or the expiration of the time allowed therefor, or express waiver of the right to file, the motion and briefs thereon shall be distributed by the clerk to the court for its consideration.

The pendency of a motion to dismiss or affirm shall not preclude the placing of the cause upon the calendar of the court for oral argument or its being called for argument when reached.

4. The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The procedure provided in paragraph 3 of this rule for motions to dismiss shall apply to and control motions to affirm. A motion to affirm may be united in the alternative with a motion to dismiss.

5. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify extended argument, order the cause transferred for hearing to the summary docket. The hearing of causes on such docket will be expedited from time to time as the regular order of business may permit. A cause may be transferred to the summary docket on application, or on the court's own motion. (See Rule 28, par. 3 and 6.)

6. Monday of each week, when the court is in session, shall be motion day; and motions specially assigned for oral argument shall be entitled to preference over other cases.

8.

BILLS OF EXCEPTION—CHARGE TO JURY—OMISSION OF UNNECESSARY EVIDENCE.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly

the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein may be set forth in full or in condensed and narrative form.

See Rules of Civil Procedure 46, 51, 75, 76, and 81.

9.

ASSIGNMENT OF ERRORS.

Where an appeal is taken to this court from any court, the appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted. No appeal shall be allowed unless such an assignment of errors shall accompany the petition. (See Rule 36.)

10.

APPEAL—CITATION—RECORD—DESIGNATION OF PARTS TO BE INCLUDED IN TRANSCRIPT.

1. When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding forty days from the day of signing the citation, whether the return day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming and Montana, when the time shall be sixty days. The citation must be served before the return day.

2. The clerk of the court from which an appeal to this court may be allowed, shall make and transmit to this court under his hand and the seal of the court a true copy of the material parts of the record, always including the assignment of errors, and any opinions delivered in the case. The papers comprising the transcript shall be fastened together in one or more volumes of convenient size, paged consecutively and indexed.

To enable the clerk to perform such duty and for the purpose of reducing the size of transcripts and eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant, or his counsel, to file with the clerk of the lower court, promptly after an appeal is taken, together with proof or acknowledgment of service of a copy on the appellee, or his counsel, a praecipe indicating the portions of the record to be incorporated into the transcript. Within ten days thereafter (unless the time be enlarged by a judge of the lower court or a justice of this court), any other party to the appeal may serve and file a designation of additional portions of the record desired to be included. Sections (c), (e), and (h) of Rule 75 and Rule 76 of the Rules of Civil Procedure are incorporated herein by reference and are made applicable to an appeal to this court from a federal district court.

The clerk of the lower court shall transmit to this court as the transcript of the record only the portions of the record covered by such designations.

The parties or their counsel may by written stipulation filed with the clerk of the lower court indicate the portions of the record to be included in the transcript, and the clerk shall then transmit only the parts designated in such stipulation.

In all cases the clerk shall include in the transcript all papers filed under authority of Rule 12. (See Rule 12, par. 4.)

If this court shall find that any portion of the record unnecessary to a proper presentation of the case has been incorporated into the transcript at the instance of either party, the whole or any part of the cost of printing and the clerk's fee for supervising the printing may be ordered to be paid by the offending party.

3. No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in the court from which the appeal is taken that original papers of any kind should be inspected in this court, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers along with the usual transcript.

5. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, findings of fact and conclusions of law thereon, opinions of the court, final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper determination of such questions.

11.

DOCKETING CASES.

1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court.

2. But the appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed by the appellant within the period of time prescribed by this rule, or by the appellee within forty days thereafter, the case shall stand for argument.

3. Upon the filing of the record brought up by appeal, the appearance of the counsel for the party docketing the case shall be entered.

12.

JURISDICTIONAL STATEMENTS.

1. Upon the presentation of a petition for the allowance of an appeal to this court, from any court, to any judge or justice empowered by law to allow it, there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question. The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction, (b) to the statute of the state, or statute or treaty of the United States, the validity of which is involved (giving the volume and page where the statute or treaty may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; and (c) to the date of judgment or decree sought to be reviewed and the date upon which the application for appeal is presented.

The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain the jurisdiction.

If the appeal is from a state court the statement shall include a statement of the grounds upon which it is contended the questions involved are substantial (*Zucht* v. *King,* 260 U. S. 174, 176, 177); specify the stage in the proceedings in the court of first instance, and in the ap-

pellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari. (See Rule 38, par. 2.)

The applicant shall append to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree.

If the appeal is from an interlocutory decree of a specially constituted district court of the United States, the statement must also include a showing of the matters in which it is claimed that the court has abused its discretion in granting or denying the interlocutory injunction. (*Alabama* v. *United States,* 279 U. S. 229.)

2. If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record,

and shall be incorporated by him in the transcript of record prepared for this court upon the appeal.

3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3.

4. The clerk of the court possessed of the record shall include the statements and motions, required and permitted to be filed under the provisions of this rule, in the transcript of record prepared for the use of this court on the appeal, anything in the praecipes or stipulations of the parties (Rule 10, par. 2) to the contrary notwithstanding.

5. After the case shall have been docketed in this court by the appellant, and the transcript of record filed (Rule 11, par. 1), the clerk of this court shall forthwith print the appellant's statement required by paragraph 1 of this rule and the opposing statement, and motions, if any, permitted by paragraph 3 of this rule, and the clerk shall thereupon distribute such printed papers to the court for its consideration.

At the time of docketing the case the appellant shall make such cash deposit with the clerk, in addition to such deposit as may be required under Rule 13, paragraph 1, as shall be necessary to defray the cost of printing 40 copies of his statement filed pursuant to paragraph 1 of this rule; and the appellee, upon demand, shall forthwith deposit with the clerk a sum sufficient to cover the cost of printing 40 copies of any statement or motions filed under paragraph 3 of this rule.

6. If either appellant or appellee fails to comply with the provisions of this rule, the clerk of this court shall

report such failure to the court immediately so that this court may take such action as it deems proper.

13.

PRINTING RECORDS—DESIGNATION OF POINTS INTENDED TO BE RELIED UPON AND OF PARTS OF RECORD TO BE PRINTED.

1. In all cases the appellant, on docketing a case and filing the record, shall make such cash deposit with the clerk for the payment of his fees as he may require, or otherwise satisfy him in that behalf.

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor (see par. 9 of this rule), the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising the printing, and other probable fees, and shall furnish the same to the party docketing the case. If such estimated sum be not paid on or before a date designated by the clerk of this court in each case, it shall be the duty of the clerk to report that fact to the court, whereupon the cause will be dismissed, unless good cause to the contrary is shown.

3. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be delivered by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 10, paragraph 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties. He shall also deposit in the law

library of Congress to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions and briefs therein.

6. If the actual cost of printing the record, together with the fees of the clerk, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fees shall exceed the estimate, the excess shall be paid to the clerk within forty days after notice thereof, and if it be not paid the matter shall be dealt with as if it were a default under paragraph 2 of this rule, as well as by rendering a judgment against the defaulting party for such excess.

7. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fees shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of a party or his surety, of having served on such party or surety a copy of the bill of fees due by him in this court, and showing that payment has not been made, an attachment shall issue against such party or surety to compel payment of such fees.

9. When the record is filed, or within fifteen days thereafter, the appellant shall file with the clerk a definite statement of the points on which he intends to rely and a designation of the parts of the record which he thinks necessary for the consideration thereof or a designation of those parts considered unnecessary, whichever is more convenient, with proof of service of the same on the adverse party. The adverse party, within ten days after service of the statement and designation required to be filed by appellant may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to

have consented to a hearing on the parts designated by the appellant. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk. The statement of points intended to be relied upon and the designations of the parts of the record to be printed shall be printed by the clerk with the record. He shall, however, omit all duplication, all repetition of titles and all other obviously unimportant matter, and make proper note thereof. The court will consider nothing but the points of law so stated. If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If either party shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 32, paragraph 6, shall be computed on the folios in the record as filed, and shall be in full for the performance of his duties in that regard.

14.

TRANSLATIONS.

Whenever any record transmitted to this court upon appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and printed with the record.

15.

FURTHER PROOF.

1. In all cases where further proof is ordered by this court, the depositions which may be taken shall be by a

commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, requiring him to file cross-interrogatories within twenty days from the service of such notice.

16.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence shall be entertained, unless such objection was taken in the court below and entered of record. Where objection was not so taken the evidence shall be deemed to have been admitted by consent.

17.

CERTIORARI TO CORRECT DIMINUTION OF RECORD.

No *certiorari* to correct diminution of the record will be awarded in any case, unless a printed motion therefor shall be made, and the facts on which the same is founded shall be shown, if not admitted by the other party, by affidavit. All such motions must be made not later than the first motion day after the expiration of sixty days from the printing of the record, unless for special cause shown the court receives the motion at a later time.

18.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the marshal at least one week before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material, placed in the custody of the marshal must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the marshal to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the marshal shall destroy them, or make such other disposition of them as to him may seem best.

19.

DEATH OF PARTY—REVIVOR—SUBSTITUTION.

1. Whenever, pending an appeal or writ of certiorari in this court, either party shall die, the proper representative in the personalty or realty of the deceased, according to the nature of the case, may voluntarily come in and be admitted as a party to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such order, if appellee or respondent, shall be entitled to have the appeal or writ of certiorari dismissed; and if the party so moving be appellant or petitioner he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, That a copy of every such order shall be printed in some newspaper of general circulation

within the State, Territory, District or Insular Possession, in which the case originated, for three successive weeks, at least sixty days before the expiration of the time designated for the representative of the deceased party to appear.

2. When the death of a party is suggested, and the representative of the deceased does not appear by the second day of the term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a court of the United States shall desire to prosecute an appeal or writ of certiorari to this court from any final judgment or decree, rendered in that court, and at the time of applying for such appeal or writ of certiorari the other party to the suit shall be dead and have no proper representative within the jurisdiction of that court, so that the suit can not be revived in that court, but shall have a proper representative in some State, Territory or District of the United States, the party desiring such appeal or writ of certiorari may procure the same, if otherwise entitled thereto, and may have proceedings on such judgment or decree superseded or stayed in the manner allowed by law and shall thereupon proceed with such appeal or writ of certiorari as in other cases. And within thirty days after the time when such appeal or writ of certiorari is returnable, or if the court be not then in session within ten days after it next convenes, the appellant or petitioner shall make a suggestion to the court, supported by affidavit, that such party was dead when the appeal or writ of certiorari was allowed, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that such deceased party had a proper representative in some State, Territory or District of the United States—giving the name and character of such representative, and his place of residence; and, upon such suggestion and a

motion therefor, an order may be obtained that, unless such representative shall make himself a party within a designated time the appellant or petitioner shall be entitled to open the record, and, on hearing have the judgment or decree reversed, if the same be erroneous: Provided, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the expiration of the time designated: And provided, also, That in every such case if the representative of the deceased party does not appear by the second day of the term next succeeding said suggestion, and the measures above provided to compel his appearance have not been taken as above required, by the opposite party, the case shall abate: And provided, also, That the representative may at any time before or after the suggestion, but before such abatement, come in and be made a party and thereupon the case shall be heard and determined as in other cases.

4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office.

(a) When the court is in vacation the motion papers may be filed with the clerk but must be presented to the court promptly after it reconvenes.

20.

CALL AND ORDER OF THE DOCKET—MOTIONS TO ADVANCE.

1. Unless it otherwise orders, the court, on the second Monday of each term, will commence calling the cases for argument in the order in which they stand on the docket,

and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed with the argument, the case shall be continued to the next term or otherwise dealt with as provided in these rules.

2. Ten cases only shall be subject to call on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons supporting the motion.

4. Criminal cases may be advanced by leave of the court on motion of either party.

5. Cases once adjudicated by this court upon the merits, and again brought up, may be advanced by leave of the court.

6. Revenue and other cases in which the United States is concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may be advanced by leave of the court on motion of the Attorney General.

7. Other cases may be advanced for special cause shown. When a case is advanced, under this or any other paragraph, it will be subject to hearing with any other case subsequently advanced and involving a like question, as if they were one case.

8. Two or more cases, involving the same question, may, by order of the court, be heard together, and argued as one case or on such terms as may be prescribed.

9. If, after a case has been continued under paragraph 1 of this rule, both parties desire to have it heard at the term of the continuance, they may file with the clerk their

joint request to that effect accompanied by their affidavits or those of their counsel giving the reasons why they failed to present their argument when the case was called and why it should be reinstated. Such a request will be granted only when it appears to the court that there was good reason for the previous failure to proceed and that the request can be granted without prejudice to parties in other cases coming on regularly for hearing.

10. No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

11. Cases on the summary docket will be heard specially as provided in paragraph 5 of Rule 7.

21.

NO APPEARANCE OF APPELLANT OR PETITIONER.

Where no counsel appears and no brief has been filed for the appellant or petitioner when the case is called for hearing, the adverse party may have the appellant or petitioner called and the appeal or writ of certiorari dismissed, or may open the record and pray for an affirmance.

22.

NO APPEARANCE OF APPELLEE OR RESPONDENT.

Where the appellee or respondent fails to appear when the case is called for hearing, the court may hear argument on behalf of the party appearing and give judgment according to the right of the case.

23.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call, and there is no brief or appearance for either party, the case shall be dismissed at the cost of the appellant or petitioner.

24.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the appellant or petitioner, unless strong cause is shown for further postponement.

25.

SUBMISSION ON BRIEFS BY ONE OR BOTH PARTIES WITHOUT ORAL ARGUMENT.

1. Any case may be submitted on printed briefs regardless of its place on the docket, if the counsel on both sides choose to submit the same in that manner, before the first Monday in May of any term. After that date cases may be submitted on briefs alone only as they are reached on the regular call.

2. When a case is reached on the regular call, if a printed brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

3. When a case is reached on the regular call and argued orally in behalf of only one of the parties, no brief for the opposite party will be received after the oral argument begins, except as provided in the next paragraph of this rule.

4. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave granted in open court after notice to opposing counsel.

26.

FORM OF PRINTED RECORDS, PETITIONS, BRIEFS, ETC.

All records, petitions, motions and briefs, printed for the use of the court must be in such form and size that

they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches, except that records in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than small pica or 11-point type) adequately leaded; and the paper must be opaque and unglazed. The clerk shall refuse to receive any petition, motion or brief which has been printed otherwise than in substantial conformity to this rule.

27.

BRIEFS.

1. The counsel for appellant or petitioner shall file with the clerk, at least three weeks before the case is called for hearing, forty copies of a printed brief.

2. This brief shall be printed as prescribed in Rule 26 and shall contain in the order here indicated—

(a) A subject index of the matter in the brief, with page references, and a table of the cases (alphabetically arranged), text books and statutes cited, with references to the pages where they are cited.

(b) A reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported.

(c) A concise statement of the grounds on which the jurisdiction of this court is invoked.

(d) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, e. g., (R. 12).

(e) A specification of such of the assigned errors as are intended to be urged. (See Rule 38, par. 2.)

(f) The argument (preferably preceded by a summary) exhibiting clearly the points of fact and of law being pre-

sented, citing the authorities and statutes relied upon, and quoting the relevant parts of such statutes, federal and state, as are deemed to have an important bearing. If the statutes are long they should be set out in an appendix.

3. Whenever, in the brief of any party, a reference is made to the record, it must be accompanied by the record page number. When the reference is to a part of the evidence, the page citation must be specific and if the reference is to an exhibit both the page number at which the exhibit appears and at which it was offered in evidence must be indicated.

4. The counsel for an appellee or respondent shall file with the clerk forty printed copies of his brief, at least one week before the case is called for hearing—such brief to be of like character with that required of the other party, except that no specification of errors need be given, and that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side.

5. Reply briefs will be received up to the time the case is called for hearing.

6. When there is no assignment of errors, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified.

7. When, under this rule, an appellant or petitioner is in default, the court may dismiss the cause; and when an appellee or respondent is in default, the court may decline to hear oral argument in his behalf.

8. No brief, required by this rule, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party.

9. A brief of an *amicus curiae* may be filed when accompanied by written consent of all parties to the case, except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and

sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such brief must bear the name of a member of the bar of this court.

28.

ORAL ARGUMENT.

1. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals or cross-writs of certiorari they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

3. Two counsel, and no more, will be heard for each party, save that in cases on the summary docket (see Rule 7, par. 5) only one counsel will be heard on the same side.

4. In cases on the regular docket (except where questions have been certified) one hour on each side, and no more, will be allowed for the argument, unless more time be granted before the argument begins. The time allowed may be apportioned between counsel on the same side, at their discretion; but a fair opening of the case shall be made by the party having the opening and closing.

5. In cases where questions have been certified to this court three-quarters of an hour shall be allowed to each side for oral argument.

6. In cases on the summary docket one-half hour on each side, and no more, will be allowed for the argument.

29.

OPINIONS OF THE COURT.

1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause the same to be printed and shall deliver a copy to the reporter.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

30.

INTEREST AND DAMAGES.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.

3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court.

4. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

31.

PROCEDENDO TO ISSUE ON DISMISSAL.

In all cases of the dismissal of any appeal or writ of certiorari in this court, the clerk shall issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, so that further proceedings may be had in such court as to law and justice may appertain. See Rules 34 and 35.

32.

COSTS.

1. In all cases where any appeal or writ of certiorari shall be dismissed in this court, costs shall be allowed to the appellee or respondent unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when only the costs incident to the motion to dismiss shall be allowed.

2. In all cases of affirmance of any judgment or decree by this court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. In cases where questions have been certified costs shall be equally divided unless otherwise ordered by the court, but where the entire record has been sent up (Rule 37, par. 2), and a decision is rendered on the whole matter in controversy, costs shall be allowed as provided in paragraphs 2 and 3 of this rule.

5. No costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, ten dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept and paid.

For an admission to the bar and certificate under seal, including filing of preliminary certificate and statements, fifteen dollars.

For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, eight cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision.

For making a manuscript copy of the record, when required under Rule 13, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing.

For preparing, on filing, for the printer, petitions for writs of certiorari, briefs, jurisdictional statements or motions when required by the Rules, or at the request of

counsel when, in the opinion of the clerk, circumstances require, indexing the same, changing record references to conform to the pagination of the printed record, and supervising the printing, five dollars for each such petition, brief, jurisdictional statement or motion. Neither the expense of printing nor the clerk's supervising fee shall be allowed as costs in the case.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars.

33.

REHEARING.

A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

34.

MANDATES.

Mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session. (See Rules 31 and 35.)

No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certio-

rari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record.

35.

DISMISSING CASES IN VACATION.

Whenever the appellant and appellee in an appeal, or the petitioner and respondent in a petition for or writ of certiorari, shall in vacation, by their attorneys of record, file with the clerk an agreement in writing that such appeal, petition for or writ of certiorari shall be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter such dismissal and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue on such dismissal without an order of the court. (See Rules 31 and 34.)

36.

APPEALS—BY WHOM ALLOWED—SUPERSEDEAS.

1. In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court. In cases where an appeal may be had from a circuit court of appeals to this court the same may be allowed, in term time or in vacation by any judge of the circuit court of appeals or by a justice of this court. In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court. The judge or justice allowing the appeal shall take the proper security for costs and sign the requisite citation and he may also, on taking the requisite security therefor, grant

a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal. See Rev. Stat., secs. 1000 and 1007, paragraph 1 of Rule 10, paragraph 2 of Rule 46, and Rule 62 (c) of the Rules of Civil Procedure. For stay pending application for review on writ of certiorari see Rule 38, paragraph 6.

2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

37.

QUESTIONS CERTIFIED BY A CIRCUIT COURT OF APPEALS OR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

(See Sec. 239 of the Judicial Code as amended by the Act of February 13, 1925.)

1. Where a circuit court of appeals or the United States Court of Appeals for the District of Columbia shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the

nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be so certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

2. If in such a cause it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up so that it may consider and decide the whole matter in controversy as upon appeal.

3. Where application is made for direction that the entire record be sent up, the application must be accompanied by a certified copy thereof.

38.

REVIEW ON WRIT OF CERTIORARI OF DECISIONS OF STATE COURTS, CIRCUIT COURTS OF APPEALS, AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

(See Secs. 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; also Act of March 8, 1934, and Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia, promulgated May 7, 1934.)

1. A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the United States Court of Appeals for the District of Columbia, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. For printing record see paragraph 7 of this rule.

2. The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the

writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition. See *United States* v. *Rimer,* 220 U. S. 547; *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.,* 242 U. S. 430; *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440; *Layne & Bowler Corporation* v. *Western Well Works,* 261 U. S. 387, 392; *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163; *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508. Forty printed copies of the petition and supporting brief shall be filed. The petition will be deemed in time when it, the record, and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925, except that in cases of petition to this court for writ of certiorari to review a judgment of a circuit court of appeals or of the United States Court of Appeals for the District of Columbia in criminal cases within the provisions of the Act of March 8, 1934, the petition shall be made within the period prescribed pursuant to said Act in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U. S. 661, 666).

3. Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court, or a justice thereof when the court is not in session), and due proof of service shall be filed with the clerk. If the United States, or an officer or agency thereof, is respondent, the service of the petition, record and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have twenty days, and where he resides in California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colo-

rado, Wyoming, Montana, or an outlying possession, shall have twenty-five days (unless enlarged by the court, or a justice thereof when the court is not in session), after notice, within which to file forty printed copies of an opposing brief, conforming to Rules 26 and 27. The brief must bear the name of a member of the bar of this court at the time of filing.

(a) If the date for filing a brief in opposition falls in the summer recess, the brief may be filed within forty days after the service of the notice, but this enlargement shall not extend the time to a later date than September 10th.

4. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, record and briefs shall be distributed by the clerk to the court for its consideration.

(a) Timely reply briefs will be considered but distribution under this rule shall not be delayed pending the filing of such briefs.

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal

question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(c) Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court.

6. Section 8 (d) of the Act of February 13, 1925, prescribes the mode of obtaining a stay of the execution and enforcement of a judgment or decree pending an application for review on writ of certiorari. The stay may be granted by a judge of the court rendering the judgment or decree, or by a justice of this court, and may be conditioned on the giving of security as in that section provided. (See Rule 36.)

7. Upon receipt of the certified transcript of the record the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising the printing, and other probable fees, and shall furnish the same to the party docketing the case. Upon payment of the amount estimated by the clerk, forty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. But where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there. When the petition is presented it will suffice to furnish ten copies of the record as printed below together with the proceedings and opinion in that court; but if the petition is granted

the requisite additional printed copies must be promptly supplied, and if not available the record must be reprinted under the supervision of the clerk.

8. Where it is necessary to print the record for the use of this court counsel should stipulate to omit from the printed record all matter not essential to a consideration of the questions presented by the petition for the writ, and when it is shown that unnecessary parts of the record have been printed although a reasonable effort was made by one of the parties to secure the printing of a proper record, such order as to costs may be made as the court shall deem proper.

39.

CERTIORARI TO A CIRCUIT COURT OF APPEALS OR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA BEFORE JUDGMENT.

(See sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.)

Proceedings to bring up to this court on writ of certiorari a case pending in a circuit court of appeals or the United States Court of Appeals for the District of Columbia, before judgment is given in such court, should conform, as near as may be, to the provisions of Rule 38; and similar reasons for granting or refusing the application will be applied. That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason.

40.

QUESTIONS CERTIFIED BY THE COURT OF CLAIMS.

(See sec. 3 (a) of the Act of February 13, 1925.)

Where the Court of Claims shall certify to this court a question of law, concerning which instructions are desired

for the proper disposition of a case, the certificate shall contain a statement of the case and of the facts on which such question arises. Questions of fact cannot be certified. The certification must be confined to definite and distinct questions of law.

41.

JUDGMENTS OF THE COURT OF CLAIMS—PETITIONS FOR REVIEW ON CERTIORARI.

(See sec. 3 (b) of the Act of February 13, 1925.)

1. In any case in the Court of Claims where both parties request in writing, at the time the case is submitted, that the facts be specially found, it shall be the duty of that court to make and enter special findings of fact as part of its judgment.

2. In any case in that court where special findings of fact are not so requested at the time the case is submitted, a party aggrieved by the judgment may, not later than twenty days after its rendition, request the court in writing to find the facts specially; and thereupon it shall be the duty of the court to make special findings of fact in the case and, by an appropriate order, to make them a part of its judgment. The judgment shall be regarded as remaining under the court's control for this purpose.

3. The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidence from which they are found.

4. A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, judgment and opinion of the court, but not the evidence. The petition shall contain a summary and short statement of the mat-

ter involved; the relevant parts of statutes involved (see Rule 27 (f)); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) The petition, brief and record shall be filed with the clerk and forty copies shall be printed under his supervision. The record shall be printed in the same way and upon the same terms that records on appeal are required to be printed. The estimated costs of printing shall be paid within five days after the estimate is furnished by the clerk and if payment is not so made the petition may be summarily dismissed. When the petition, brief and record are printed the petitioner shall forthwith serve copies thereof on the respondent, or his counsel of record, and shall file with the clerk due proof thereof.

5. Within twenty days after the petition, brief and record are served (unless enlarged by the court, or a justice thereof when the court is not in session) the respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27. Upon the expiration of that period, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, briefs and record, shall be distributed by the clerk to the court for its consideration. (See Rule 38, par. 4 (a).)

The provision of subdivision (a) of paragraph 3 of Rule 38 shall apply to briefs in opposition to petitions for writs of certiorari to review judgments of the Court of Claims.

6. The same general considerations will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims as are applied to applications for such writs to other courts. (See par. 5 of Rule 38.)

42.

JUDGMENTS OF COURT OF CUSTOMS AND PATENT APPEALS OR OF SUPREME COURT OF THE COMMONWEALTH OF THE PHILIPPINES—PETITIONS FOR REVIEW ON CERTIORARI.

(See sec. 195 Judicial Code, as amended, or sec. 7 of the Act of February 13, 1925.)

Proceedings to bring up to this court on writ of certiorari a case from the Court of Customs and Patent Appeals or from the Supreme Court of the Commonwealth of the Philippines should conform, as near as may be, to the provisions of Rule 38. The same general considerations which control when such writs to other courts are sought will be applied to them.

43.

ORDER GRANTING CERTIORARI.

Whenever application for a writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the application. The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

44.

RULES, COSTS, FEES, ETC., ON CERTIORARI.

Where not otherwise specially provided, the rules relating to appeals, including those relating to costs, fees and interest, shall apply, as far as may be, to petitions for, and causes heard on, certiorari.

45.

CUSTODY OF PRISONERS PENDING A REVIEW OF PROCEEDINGS IN HABEAS CORPUS.

(See Rev. Stat. sec. 765 and Act of February 13, 1925, sec. 6.)

1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.

46.

REVIEW ON APPEAL.

1. Appeals to this court from the district courts and the circuit courts of appeals are not affected by the Act of January 31, 1928, or the amendatory Act of April 26, 1928,

both of which are copied in the appendix hereto. Such appeals, where admissible, must be sought, allowed and perfected as provided in other statutes and in the rules of this court. The Act of February 13, 1925, copied in the appendix hereto, shows when an appeal is admissible and when the mode of review is limited to certiorari.

2. Under the Act of January 31, 1928, as amended by the Act of April 26, 1928, the review which theretofore could be had in this court on writ of error may now be obtained on an appeal. But the appeal thereby substituted for a writ of error must be sought, allowed and perfected in conformity with the statutes theretofore providing for a writ of error. The appeal can be allowed only on the presentation of a petition showing that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, a review could be had in this court on writ of error. The petition must be accompanied by an assignment of errors (see Rule 9), and statement as to jurisdiction (see Rule 12), and the judge or justice allowing the appeal must take proper security for costs and sign the requisite citation to the appellee. See paragraph 1 of Rule 10 and paragraph 1 of Rule 36. The citation must be served on the appellee or his counsel and filed, with proof of service, with the clerk of the court in which the judgment to be reviewed was entered. The mode of obtaining a supersedeas is pointed out in paragraph 2 of Rule 36.

47.

APPEALS UNDER THE ACT OF AUGUST 24, 1937.

Appeals to this court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States; provided, however, that when an appeal is taken under Section 2 of the Act the service required by paragraph 2 of Rule 12 shall be made on all parties to the suit other than the party or parties

taking the appeal. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed.

48.

JOINT OR SEVERAL APPEALS OR PETITIONS FOR WRITS OF CERTIORARI; SUMMONS AND SEVERANCE ABOLISHED.

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition.

49.

NO SESSION ON SATURDAY.

The court will not hear arguments or hold open sessions on Saturday.

50.

ADJOURNMENT OF TERM.

The court will at every term announce, at least three weeks in advance, the day on which it will adjourn, and will not take up any case for argument, or receive any case upon briefs, within two weeks before the adjournment, unless otherwise ordered for special cause shown.

51.

ABROGATION OF PRIOR RULES.

These rules shall become effective February 27, 1939, and be printed as an appendix to 306 U. S. The rules promulgated June 5, 1928, appearing in 275 U. S., Appendix, and all amendments thereof are rescinded, but this shall not affect any proper action taken under them before these rules become effective.

APPENDIX TO RULES.

JURISDICTIONAL ACTS.

Act of February 13, 1925.

Chapter 229, 43 Stat. 936.

(Amendments to June 29, 1938, included.)

An Act To amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows:

[1] Sec. 128 (a) The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238.

Second. In the United States District Courts for Hawaii and for Puerto Rico, in all cases.

Third. In the District Court for the District of Alaska, or any division thereof, and in the District Court of the Virgin Islands, in all cases; and in the United States District Court for the District of the Canal Zone in the cases and modes prescribed in sections 61 and 62, title 7, Canal Zone Code (48 Stat. 1122).

Fourth. In the Supreme Courts of the Territory of Hawaii and of Puerto Rico. In all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interests and costs, exceeds $5,000, and in all habeas corpus proceedings.

Fifth. In the United States Court for China, in all cases.

(b) The Circuit court of appeals shall also have appellate jurisdiction—

[2] First. To review the interlocutory orders or decrees of the district courts, including the District Courts of Alaska, Hawaii, Virgin Islands and Canal Zone, which are specified in section 129.

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[1] Amended, Act of June 20, 1938, Chapter 526, 52 Stat. 779.

[2] Amended by sec. 1, Act of April 11, 1928, Chapter 354, 45 Stat. 422.

[3] Second. To review decisions of the district courts, under section 9 of the Railway Labor Act.

(c) The circuit courts of appeal shall also have an appellate and supervisory jurisdiction under sections 24 and 25 of the Bankruptcy Act of July 1, 1898, over all proceedings, controversies, and cases had or brought in the district courts under that Act or any of its amendments, and shall exercise the same in the manner prescribed in those sections; and the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit in this regard shall cover the courts of bankruptcy in Alaska and Hawaii, and that of the Circuit Court of Appeals for the First Circuit shall cover the court of bankruptcy in Porto Rico.

(d) The review under this section shall be in the following circuit courts of appeal: The decisions of a district court of the United States within a State in the circuit court of appeals for the circuit embracing such State; those of the District Court of Alaska or any divisions thereof, the United States district court, and the Supreme Court of Hawaii, and the United States Court for China, in the Circuit Court of Appeals for the Ninth Circuit; those of the United States district court and the Supreme Court of Porto Rico in the Circuit Court of Appeals for the First Circuit; those of the District Court of the Virgin Islands in the Circuit Court of Appeals for the Third Circuit; and those of the District Court of the Canal Zone in the Circuit Court of Appeals for the Fifth Circuit.

(e) The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 5 of "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 11 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

SEC. 129. Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken

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[3] Amended by sec. 13 (a), Act of May 20, 1926, Chapter 347, 44 Stat. 587.

from such interlocutory order or decree to the circuit court of appeals; and sections 239 and 240 shall apply to such cases in the circuit courts of appeals as to other cases therein: *Provided,* That the appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof: *Provided, however,* That the district court may, in its discretion, require an additional bond as a condition of the appeal.

[4] (a) In all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may also be taken to said court from an interlocutory decree in admiralty determining the rights and liabilities of the parties: *Provided,* That the same is taken within fifteen days after the entry of the decree: *And provided further,* That within twenty days after such entry the appellant shall give notice of the appeal to the appellee or appellees; but the taking of such appeal shall not stay proceedings under the interlocutory decree unless otherwise ordered by the district court upon such terms as shall seem just.

[5] (b) That when in any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals: *Provided,* That such appeal be taken within thirty days from the entry of such decree or from the date of this act; and the proceedings upon the accounting in the court below shall not be stayed unless so ordered by that court during the pendency of such appeal.

SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

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[4] Act of April 3, 1926, Chapter 102, 44 Stat. 233.

[5] Act of February 28, 1927, Chapter 228, 44 Stat. 1261.

(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: *Provided,* That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 1010 of the Revised Statutes.

SEC. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(1) Section 2 of the Act of February 11, 1903, "to expedite the hearing and determination" of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

(2) The Act of March 2, 1907, "providing for writs of error in certain instances in criminal cases" where the decision of the district court is adverse to the United States.

(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order

made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 316 of "An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs, and for other purposes" approved August 15, 1921.

SEC. 239. In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal.

SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be

restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

[6] SEC. 2. That cases in a circuit court of appeals under section 9 of the Railway Labor Act; under section 5 of "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914; and under section 11 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, are included among the cases to which sections 239 and 240 of the Judicial Code shall apply.

SEC. 3. (a) That in any case in the Court of Claims, including those begun under section 180 of the Judicial Code, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause.

(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal.

(c) All judgments and decrees of the Court of Claims shall be subject to review by the Supreme Court as provided in this section, and not otherwise.

SEC. 4. That in cases in the district courts wherein they exercise concurrent jurisdiction with the Court of Claims or adjudicate claims against the United States the judgments shall be subject to review in the circuit courts of appeals like other judgments of the district courts; and sections 239 and 240 of the Judicial Code shall apply to such cases in the circuit courts of appeals as to other cases therein.

SEC. 5. That the Court of Appeals of the District of Columbia shall have the same appellate and supervisory jurisdiction over proceedings,

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[6] Amended by sec. 13 (b) of Act of May 20, 1926, Chapter 347, 44 Stat. 587.

controversies, and cases in bankruptcy in the District of Columbia that a circuit court of appeals has over such proceedings, controversies, and cases within its circuit, and shall exercise that jurisdiction in the same manner as a circuit court of appeals is required to exercise it.

[7] SEC. 6. (a) In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 1014 of the Revised Statutes (U. S. C., title 18, sec. 591) or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) In such a proceeding in the District Court of the United States for the District of Columbia, or before a justice thereof, the final order shall be subject to review on appeal, by the United States Court of Appeals for the District of Columbia: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 1014 of the Revised Statutes (U. S. C., title 18, sec. 591) or the detention pending removal proceedings.

(c) Sections 239 and 240 of the Judicial Code shall apply to habeas corpus cases in the circuit courts of appeals and in the Court of Appeals of the District of Columbia as to other cases therein.

(d) The provisions of sections 765 and 766 of the Revised Statutes, and the provisions of an Act entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings," approved March 10, 1908, shall apply to appellate proceedings under this section as they have heretofore applied to direct appeals to the Supreme Court.

SEC. 7. That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, or wherein the title or possession of real estate exceeding in value the sum of $25,000 is involved or brought in question, it shall be competent for the Supreme Court of the United States, upon the petition of a party aggrieved by the final judgment

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[7] Amended, Act of June 29, 1938, Chapter 806, 52 Stat. 1232.

or decree, to require, by certiorari, that the cause be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought before it on writ of error or appeal; and, except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review.

SEC. 8. (a) That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months: *Provided,* That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

(b) Where an application for a writ of certiorari is made with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia before the court wherein the same is pending has given a judgment or decree the application may be made at any time prior to the hearing and submission in that court.

(c) No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

(d) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

SEC. 9. That in any case where the power to review, whether in the circuit courts of appeals or in the Supreme Court, depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record may be shown and ascertained by the oath of a party to the cause or by other competent evidence.

SEC. 10. That no court having power to review a judgment or decree of another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out; but where such error occurs the same shall be disregarded and the court shall proceed as if in that regard its power to review were properly invoked.

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

SEC. 12. That no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: *Provided*, That this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock.

SEC. 13. That the following statutes and parts of statutes be, and they are, repealed:

Sections 130, 131, 133, 134, 181, 182, 236, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, and 252 of the Judicial Code.

Sections 2, 4 and 5 of "An Act to amend an Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911," approved January 28, 1915.

Sections 2, 3, 4, 5, and 6 of "An Act to amend the Judicial Code, to fix the time when the annual term of the Supreme Court shall commence, and further to define the jurisdiction of that court," approved September 6, 1916.

Section 27 of "An Act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands," approved August 29, 1916.

So much of sections 4, 9, and 10 of "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887, as provides for a review by the Supreme Court on writ of error or appeal in the cases therein named.

So much of "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings," approved March 10, 1908, as permits a direct appeal to the Supreme Court.

So much of sections 24 and 25 of the Bankruptcy Act of July 1, 1898, as regulates the mode of review by the Supreme Court in the proceedings, controversies, and cases therein named.

So much of "An Act to provide a civil government for Porto Rico, and for other purposes," approved March 2, 1917, as permits a direct review by the Supreme Court of cases in the courts in Porto Rico.

So much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii.

So much of section 9 of the Act of August 24, 1912, relating to the government of the Canal Zone as designates the cases in which, and the courts by which, the judgments and decrees of the district court of the Canal Zone may be reviewed.

Sections 763 and 764 of the Revised Statutes.

An Act entitled "An Act amending section 764 of the Revised Statutes," approved March 3, 1885.

An Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899.

An Act entitled "An Act to amend section 237 of the Judicial Code," approved February 17, 1922.

An Act entitled "An Act to amend the Judicial Code in reference to appeals and writs of error," approved September 14, 1922.

All other Acts and parts of Acts in so far as they are embraced within and superseded by this Act or are inconsistent therewith.

SEC. 14. That this Act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time

for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect.

Approved, February 13, 1925.

ACT OF JANUARY 31, 1928.

Chapter 14, 45 Stat. 54.

An Act In reference to writs of error

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

SEC. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts.

ACT OF APRIL 26, 1928.

Chapter 440, 45 Stat. 466.

An Act To amend section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

"SEC. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

Act of August 24, 1937.

Chapter 754, 50 Stat. 751.

An Act To provide for intervention by the United States, direct appeals to the Supreme Court of the United States, and regulation of the issuance of injunctions, in certain cases involving the constitutionality of Acts of Congress, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act.

Sec. 2. In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation

of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

SEC. 3. No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or

permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible times and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

SEC. 4. Section 13 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 17), is hereby amended to read as follows:

"SEC. 13. Whenever any district judge by reason of any disability or absence from his district or the accumulation or urgency of business is unable to perform speedily the work of his district, the senior circuit judge of that circuit, or, in his absence, the circuit justice thereof, shall designate and assign any district judge of any district court within the same judicial circuit to act as district judge in such district and to discharge all the judicial duties of a judge thereof for such time as the business of the said district court may require. Whenever it is found impracticable to designate and assign another district judge within the same judicial circuit as above provided and a certificate of the needs of any such district is presented by said senior circuit judge or said circuit justice to the Chief Justice of the United States, he, or in his absence the senior associate justice, shall designate and assign a district judge of an adjoining judicial circuit if practicable, or if not practicable, then of any judicial circuit, to perform the duties of district judge and hold a district court in any such district as above provided: *Provided, however,* That before any such designation or assignment is made the senior circuit judge of the circuit from which the designated or assigned judge is to be taken shall consent thereto. All designations and assignments made hereunder shall be filed in the office of the clerk and entered on the minutes of both the court from and to which a judge is designated and assigned, as well as on the minutes of the Supreme Court of the United States, to the clerk of which both of such other clerks shall immediately report the fact and period of assignment."

SEC. 5. As used in this Act, the term "court of the United States" means the courts of record of Alaska, Hawaii, and Puerto Rico, the United States Customs Court, the United States Court of Customs and Patent Appeals, the Court of Claims, any district court of the United States, any circuit court of appeals, and the Supreme Court

of the United States; the term "district court of the United States" includes the District Court of the United States for the District of Columbia; the term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia; the term "circuit" includes the District of Columbia; the term "senior circuit judge" includes the Chief Justice of the United States Court of Appeals for the District of Columbia; and the term "judge" includes justice.

Approved August 24, 1937.

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